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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JULIUS TRUMP, et al.,

Petitioners,

v.

BERTRAM FIELD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a tender offer be deemed to be pending even though, within five business days of the public announcement of the offer, the bidders further announced that they had determined not to continue with the offer and Securities and Exchange Commission ("SEC") Rule 14d-2 clearly mandates that no tender offer exists on these facts?

2. Was it proper for the Second Circuit to hold that, for purposes of the federal securities law, the effectiveness of a tender offer withdrawal depends upon the subjective intent of the offeror when full disclosure has been made of all material facts?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Julius Trump, Eddie Trump, Stuart M. Sloan, Samuel N. Stroum, M. Lamont Bean, Fenwick Crane, E. Ronald Erickson, Calvin Hendricks, Robert B. Hutchinson, Earl W. Smith, Raymond C. Swanson, Pay'n Save Corporation, The Trump Group, Ltd., NLAC Corp., Acquicorp, Inc., Mergicorp, Inc., TGAC Corp., and TG Limited and the respondent Bertram Field.

The parties before this Court are identical to those listed above.

RULE 28.1 LIST

Petitioners Pay'n Save Corporation, The Trump Group, Ltd., NLAC Corp., Acquicorp, Inc., Mergicorp, Inc., TGAC Corp., and TG Limited are affiliated with Northen Pacific Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, defendants in the district court, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit that reversed, in part, a judgment of the United States District Court for the Southern District of New York dismissing Respondent's complaint for failure to state a claim on which relief may be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is set forth as Appendix Exhibit A. The decision is reported as *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988) ("Second Circuit Opinion"). The order of the Court of Appeals denying a petition for rehearing and suggestion of rehearing *en banc* is not reported and is set forth as Appendix Exhibit B.

The opinion of the United StatesDistrict Court for the Southern District of New York dismissing the complaint is set forth as Appendix Exhibit C.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1988. (Appendix Exhibit A). Rehearing was denied by an order dated August 30, 1988. (Appendix Exhibit B). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

STATUTES AND RULES INVOLVED

The statutes and rules involved in this Petition are Section 14(d)(7) of the Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(7) (1982) ("Section 14(d)(7)") and SEC Rule 14d-2, 17 C.F.R. § 240.14d-2 (1988) ("Rule 14d- 2"). (Appendix Exhibits D and E, respectively).

STATEMENT OF THE CASE

Section 14(d)(7) commands that a tender offeror must pay the same price to every shareholder whose shares are "taken up and paid for pursuant to [a] tender offer."[2] By its terms, the statute applies only to purchases made *pursuant to a tender offer*. This case presents the issue of whether Section 14(d)(7) can be judicially expanded to cover purchases made – not during a tender offer – but after a tender offer has been terminated pursuant to Rule 14d-2. The Court of Appeals ruled that Sec-

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1 This opinion is reported as Field v. Trump, 661 F. Supp. 529 (S.D.N.Y. 1987) ("District Court Opinion").

2 Section 14(d)(7) says in full:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

tion 14(d)(7) continues to apply even where there is an announced termination of a tender offer in compliance with the terms of the offer and authorized by Rule 14d-2, unless the tender offeror subjectively intends to "genuinely abandon the goal of the offer," *i.e.,* acquisition of the target company.

The Second Circuit's holding conflicts in principle with authority in other circuits and is contrary to this Court's reasoning in *Schreiber v. Burlington Northern, Inc.,* 472 U.S. 1 (1985), and *Pinter v. Dahl,* 108 S.Ct. 2063 (1988). In addition, the decision also conflicts with the clear principle that certainty is to be preferred in the securities law as well as with the contractual approach adopted by other circuits. Moreover, the decision is inconsistent with the allegations of Respondent's complaint and prior Second Circuit authority. Prior to the Second Circuit's holding, offerors had the right to terminate their offers in accordance with contractual provisions that were governed by state law. Offerors, targets and shareholders could easily determine whether a tender offer had been terminated and new offer commenced. This determination could be made on the basis of objective, clearly delineated criteria. There could be no question but that a proper termination was effective. Now, resolution of the same question by offerors, targets and shareholders is impossible short of a full judicial inquiry, armed with hindsight, into the offeror's subjective intent at the time the "termination" was announced. This reduces those involved in fast paced tender offers to confusion over how to respond.

Background

This case arises out of the 1984 acquisition of Pay'n Save Corporation, by certain members of Pay'n Save management and by Julius and Eddie Trump (the "Trumps"). Stuart M. Sloan and Samuel N. Stroum (the "Stroums") were Pay'n Save's largest shareholders, owning 18.4% of its stock. (AC ¶ 14)[3] The Stroums acquired their Pay'n Save stock at $25 per share in a merger of a business wholly-owned by them with Pay'n Save in

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3 Citations to "AC ¶ " are to the Amended Class Action Complaint, filed April 10, 1986.

January 1984. (AC ¶¶ 8, 13, 14) According to the complaint, various conflicts arose between the Stroums, who had been elected to Pay'n Save's board of directors, and Pay'n Save's management. (AC ¶¶ 14, 15, 16) Because of these conflicts, certain members of management, principally M. Lamont Bean, Calvin Hendricks and Ronald Erickson, decided to seek a friendly purchaser for Pay'n Save. (AC ¶¶ 6, 17, 19) Eventually, they found the Trumps. (AC ¶ 20)

The September 7, 1984 Announcement

On September 6, 1984, the Trumps, Bean, Hendricks and Erickson offered to acquire the company for $22.00 per share. (AC ¶¶ 28, 32) At the board meeting at which this offer was made, the Stroums objected that the price to be paid was too low, and the Trumps agreed to increase the offer to $22.50 per share. (AC ¶ 32) Although the Stroums voted against the offer, the board as a whole accepted the proposal by a 4-2 vote. (AC ¶¶ 7, 8, 32) After an all-night meeting, Pay'n Save issued a press release announcing that it had signed a merger agreement with the Trumps and that the Trumps would, in the future, commence a tender offer for all common stock of Pay'n Save at $22.50 per share in cash (the "September 7 Announcement").[4] (AC ¶¶ 32, 41)

According to the complaint, the Trumps met with the Stroums over the next several days in an attempt to settle the Stroums' objections to the proposed offer. (AC 34) By September 12, 1984 — four business days after the September 7 Announcement — these attempts failed, and the Trumps decided to announce that they no longer intended to commence a tender offer at $22.50 per share (the "September 12 Announcement").[5]

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4 This announcement, because it contained the price, terms, number of shares and name of the target company, triggered the "five day rule" contained in SEC Rule 14d-2(b).

5 This announcement said in full:

> The Trump Group (Eddie and Julius Trump) announced today that it had withdrawn its offer to acquire all shares of Pay'n Save Corporation common stock at a net price of $22.50 per share, which had been announced on September 7, 1984. The Trump Group stated that it had withdrawn its offer in order to facilitate negotiations with Samuel N.

(AC ¶ 34) The Trumps also announced that the offer was withdrawn to facilitate negotiations with the Stroums.[6]

Several hours after the announcement, the Trumps agreed to increase the price for Pay'n Save shares to $23.50 in cash, and purchased an option on the Stroums' shares for $3.3 million plus $900,000 for fees and expenses. (AC ¶ 35) The option gave the Trumps the right to purchase the Stroums' shares for $23.50, at any time during the next six months, even if a third party made a higher bid for Pay'n Save stock. (AC ¶ 35; Second Circuit Opinion, 850 F.2d at 941-42) The next day, September 13, 1984, the Trumps commenced a tender offer for Pay'n Save stock at $23.50 per share. (AC ¶ 5)

Respondent Bertram Field alleges in his amended complaint, filed after discovery, that the option agreement and the payments thereunder constituted additional consideration paid *during* a tender offer in violation of Section 14(d)(7) and SEC Rule 10b-13. (AC ¶¶ 39, 40, 44) Since the purchase that forms the basis of the complaint came before the September 13, 1984 tender offer, Section 14(d)(7) would apply only if the "offer" that would have been commenced by the September 7 Announcement had not been terminated. The complaint does not allege that the Trumps commenced a formal tender offer, that is, pursuant to Rule 14d-2(a), prior to September 13. Nor does the complaint purport to allege an "unorthodox" tender offer pursuant to the eight-factor test announced in *Wellman v. Dickinson*, 475 F. Supp. 783, 817-18 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). *See also* Exchange Act Release No. 24,976, 52 Fed. Reg. 37,472 at 37,475 (1987) (citing eight factor test); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1276-77 (1973) (suggesting a tender offer definition that "would . . . avoid broadening the applicability of sections 14(d)(5-7)"). Indeed, the complaint concedes that the September 12 Announcement was made and

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Stroum, Stuart M. Sloan and their affiliates regarding the acquisition of Pay'n Save by the Trump Group.

6 Because this announcement was made within 5 business days, pursuant to Rule 14d-2(b), it avoided *nunc pro tunc* the tender offer that would otherwise have been deemed to commence on September 7.

never contested that it complied with Rule 14d-2, but nevertheless claimed that it was a "sham." (AC ¶¶ 34, 44) Petitioners moved to dismiss the complaint under Rule 12b(6).[7]

The District Court granted Petitioners' motion in its entirety. District Court Opinion, 661 F. Supp. at 535. The District Court held that no tender offer at $22.50 had been commenced because, within five business days after the September 7 Announcement, the Trumps had announced that they had determined not to continue with that tender offer. District Court Opinion, 661 F. Supp. at 532. The District Court further held, relying principally on *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893 (D. Del. 1984), a companion case to *Schreiber v. Burlington Northern*, 472 U.S. 1 (1985), that the option agreement had occurred prior to the $23.50 tender offer, and that as a matter of law, there was no basis to integrate the option agreement into the subsequent $23.50 tender offer. District Court Opinion, 661 F. Supp. at 532.

The Second Circuit reinstated the Section 14(d)(7) claim. 850 F.2d at 950. Although the Second Circuit recognized that Section 14(d)(7)'s application depended upon SEC Rule 14d-2(b), *id.* at 943, and recognized that Petitioners had literally complied with that Rule, *id.* at 944-45, the court nevertheless held that Rule 14d-2(b) was subject to the court's newly discovered general principle that "an announcement of a withdrawal is effective when the offeror genuinely intends to abandon the goal of the original offer." *Id.* at 945. Accordingly, the Second Circuit found the complaint did state a Section 14(d)(7) claim. *Id.*

The Court of Appeals substantially expanded the scope of Section 14(d)(7), contrary to the intent of Congress and the SEC. In so doing, it ignored this Court's teachings in *Pinter v. Dahl*, 108 S. Ct. 2063 (1988), that statutes must be construed in harmony with the regulatory scheme and the intent of Congress as evidenced by the language of the statute and its legislative history. Further, the Second Circuit never addressed the

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7 Field also claimed that Petitioners violated Section 10(b) and Rule 10b-5, Section 14(e), Section 14(a) and the Racketeering Influenced and Corrupt Organizations Act ("RICO"). Finally, Field claimed violations of various state securities law and fiduciary duties. All of these claims were dismissed and those dismissals were affirmed.

Brill case, though it was dispositive in the District Court and involved the same facts as this Court's decision in *Schrieber v. Burlington Northern*, 472 U.S. 1 (1985). Nor did the court address the well established law in other circuits that an offeror is the master of the offer and may set such terms as he may wish – including terms governing termination. *See Kroeze v. Chloride Group Ltd.*, 572 F.2d 1099, 1105 (5th Cir. 1978).

SUMMARY

The Second Circuit made two fundamental errors. First, it ignored the plain meaning of a clear SEC Rule adopted pursuant to an express delegation of Congressional authority. Second, the Circuit Court announced a new rule – neither anticipated by case law nor permitted by the statute and applicable rule – conditioning effective termination of a tender offer on the tender offeror's subjective intent. This is contrary to the Williams Act's emphasis on full disclosure, certainty and predictability, and to authority in other circuits that an offer is a contractual document governed by state law and can be terminated in accordance with its terms.

More specifically, the Second Circuit's Opinion:

- Will lead to conflicting decisions in the various district and circuit courts – the terms and effects of a nationwide tender offer will depend on post-hoc judicial decisions that will vary depending upon the court in which the suits are filed.
- Makes the mechanics of tender offers dependent upon *subjective* intent, thus denying shareholders, investors, management and bidders – the certainty and predictability provided by an objective measure of tender offer termination.
- Changes a technical, objective SEC rule into a broad grant of substantive rights endangering withdrawal rights, proration rights and the best price rule.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S SUBJECTIVE TEST IS CONTRARY TO A CLEAR SEC RULE DIRECTLY ON POINT

There can be no Section 14(d)(7) violation here because pursuant to Rule 14d-2, there was no pending tender offer when the Trumps and the Stroums reached their agreement. It is undisputed that an actual pending tender offer is a prerequisite to liability under Section 14(d)(7). *See* Second Circuit Opinion, 850 F.2d at 943; District Court Opinion, 661 F. Supp. at 532. *See also, Priddy v. Edelman*, 679 F. Supp. 1425, 1432 (E.D. Mich. 1988).

The Second Circuit found such a tender offer, but this finding is fundamentally flawed. The court held that the September 7 Announcement commenced a tender offer. But absent the formal commencement of a tender offer pursuant to Rule 14d-2(a), or an "unorthodox tender offer," neither of which was alleged in the complaint, the announcement could constitute a commencement only because of Rule 14d-2(b). And yet the court applied only half the Rule. Indeed, the court dismissed the Rule as "irrelevant." *See* Second Circuit Opinion, 850 F.2d at 944. It was not free to do this.

Rule 14d-2(b) deals with the legal effect of public announcements like the September 7 Announcement:[8]

> A public announcement . . . shall be deemed to constitute the commencement of a tender offer . . . *Except* That such tender offer shall not be deemed to be [commenced] if within five business days of such public announcement, the bidder . . . [m]akes a subsequent announcement stating that the bidder has determined not to continue with such tender offer . . . .

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[8] For purposes of the Rule, such an announcement must concern an all-cash tender offer and disclose the identity of the tender offeror, the identity of the subject company, the amount and class of securities being sought and the price to be paid therefor. *See* Rule 14d-2(c). Neither Respondent nor the Second Circuit challenged the application of the Rule to the September 7 Announcement.

Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (emphasis in original). Were it not for this Rule, such an announcement would not commence a tender offer. *See* Rule 14d-2(a)(1)-(4). Nor does the amended complaint allege any of the factors required to establish a so-called "unorthodox" tender offer. *See Wellman v. Dickinson*, 475 F. Supp. 783, 817-18 (S.D.N.Y. 1979). Thus, it is only *because* of Rule 14d-2(b) that such an announcement can be "*deemed* to constitute the commencement of a tender offer," and then only if the tender offeror does not, within five business days, announce his decision not to continue with the offer. If the tender offeror "makes the subsequent announcement contemplated by the [Rule], *the initial announcement will not be deemed to commence an offer*." *See* Exchange Act Release No. 16,384, 1979-80 Fed. Sec. L. Rep. (CCH) ¶ 82,373 at 82,583 (1979) (emphasis added).

The Trumps disclosed their decision not to continue with the previously announced $22.50 per share offer in the September 12 Announcement. Respondent has never alleged that the September 12 Announcement did not comply with the Rule. However, notwithstanding the Second Announcement, the Second Circuit used the Rule to create a tender offer that would not otherwise exist. It then ignored the balance of the Rule – the provision making clear that once a tender offeror has announced within five business days his decision not to continue with the offer, there is no offer. *See* Second Circuit Opinion, 850 F.2d at 943. The court's use of this artificially truncated rule to apply Section 14(d)(7) is especially wrong because the Rule's sole purpose is to define when Section 14(d) applies. *See* Exchange Act Release No. 16,384, 1979-80 Fed. Sec. L. Rep. (CCH) ¶ 82,373 at 82,583 n.12 (making clear that the Rule controls application of Section 14(d)).

Rule 14d-2 was adopted for this purpose pursuant to an express Congressional delegation of authority to the SEC to determine to which offers the statute applies. *See* Section 14(d)(8)(C), 15 U.S.C. § 78(n)(d)(8) (1982) ("The provisions of [Section 14(d)] shall not apply to any offer . . . which the Commission, by rules or regulations or by order, shall exempt . . . as not comprehended within the purposes of this subsection."). *See also* Section 14(e), 15 U.S.C. § 78(n)(e) (1982) ("The Com-

mission shall, for purposes of this subsection, by rules and regulations define . . . such acts and practises as are fraudulent, deceptive, or manipulative."). The Commission relied on both of these sections as authority for adopting Rule 14d-2. *See* Exchange Act Release No. 16,384, 1979-80 Fed. Sec. L. Rep. (CCH) ¶ 82,373 at 82,577.

Because of this broad delegation, Rule 14d-2 must be treated as if it were part of the statute.

> In view of this explicit delegation of substantive authority, the [Commission's] definition of [commencement] is "entitled to more than mere deference or weight." Rather, the [Commission's] definition is entitled to "legislative effect" because, "[i]n a situation of this kind, Congress entrusts to the [Commission], rather than to the courts, the primary responsibility for interpreting the statutory term."

Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981) (quoting *Batterton v. Francis*, 432 U.S. 416, 426 (1977)) (where Congress makes express delegation to agency, the agency "adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner", *id.* at 425).

The Court of Appeals held that the September 7 Announcement was the "technical 'commencement' of a tender offer." Second Circuit Opinion, 850 F.2d at 943. It was no such thing. According to the very regulation the Court relied upon in holding that the September 7 Announcement commenced a tender offer – Rule 14d-2 – the announcement ceased to have this technical legal effect after the release of the September 12 Announcement. By disregarding the second half of the rule, the court substituted its own judgment for that of the SEC. The court might disagree with the SEC, but it is not free to legislate its own regulatory scheme. That power has been delegated to the Commission.

II.

CONDITIONING TENDER OFFER WITHDRAWAL UPON THE TENDER OFFEROR'S SUBJECTIVE INTENT IS INCONSISTENT WITH AUTHORITY IN OTHER CIRCUITS

The subjective test announced by the Second Circuit, *i.e.*, does the offeror "genuinely intend[] to abandon the goal of the original offer," rejects the legal principle that tender offers are contracts that may be conditioned as the tender offeror sees fit. 850 F.2d at 945. Instead, the Court of Appeals has made withdrawal or termination of an offer dependent upon subjective intent, not only injecting substantial uncertainty into the tender offer process but blurring the distinction between a bidder's goal – *e.g.*, control of the subject company – and one of the means available to achieve that goal – a tender offer.

A. The Second Circuit Ignored Precedent In Other Circuits Establishing The Contractual Nature Of Tender Offers

Before the Second Circuit acted, bidders could reserve the right to terminate their tender offers. Such reservations gave the public an objective yardstick against which they could judge terminations. Any conflict between the termination and the right to terminate reserved by the tender offeror could be remedied through state contract law. Now, tender offerors cannot simply reserve the right to terminate in certain circumstances. The Second Circuit has imposed a new overriding condition – for a tender offer termination to be effective, the tender offeror must also abandon the goal of the tender offer, *i.e.*, to acquire control of the target. If a target company makes it impossible for the bidder to proceed by tender offer, the bidder cannot purchase shares by any other method without application of the tender offer rules to those purchases. It must, instead, walk away. *Cf. Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 52 (2d Cir. 1985) (after target made tender offer untenable, bidder terminated and gained control a different way).

In contrast, the Fifth Circuit has recognized that, like all contractual offerors, "[t]he [tender] offeror is the master of his offer. An offeror may prescribe as many conditions, terms or the

like as he may wish. . . ." *Kroeze v. Chloride Group Ltd.*, 572 F.2d 1099, 1105 (5th Cir. 1978). *Accord Indiana Nat'l Bank v. Mobil Oil Corp.*, 578 F.2d 180, 185 (7th Cir. 1978). *See also Newmont Mining Corp. v. Pickens*, 831 F.2d 1448, 1450 (9th Cir. 1987) ("the purpose of the [Williams] Act is to require disclosure to permit shareholders to make an informed decision, and that statute was not intended to impose substantive restrictions on the actual terms of tender offers").

The SEC also recognizes that the terms of the offer – so long as they are fully disclosed – are a matter of contract between the bidder and the shareholders. It has explained that:

> Tender offer materials typically contain various reservations of rights whereby the bidder reserves the right to, among other things, extend or *terminate* the offer, waive conditions, increase or decrease the consideration offered or the number of shares being sought, or otherwise alter terms. *The Commission recognizes that such reservations are an acceptable means of permitting the bidder to take action varying the terms of an offer, so long as the action taken would not contravene the Williams Act and rules.*

Exchange Act Release No. 24,296, 52 Fed. Reg. 11,458 at 11,460 (1987) (emphasis added). In the past, shareholders could know exactly when an offer was terminated. Now, of course, all objectivity has been removed and the effectiveness of a purported termination turns on the bidder's subjective intent. The result, of course, is uncertainty as to the continuing applicability of the substantive requirements of the act, including the proration requirement (Section 14(d)(6)), the best-price requirement (Section 14(d)(7)) and the all-holders rule (Rule 14d-10). If the offer has been terminated, then these requirements are not applicable. If not, then they remain applicable.

B. The Second Circuit's Expansive Treatment Of Tender Offer Withdrawal Belies The Williams Act's Emphasis on Disclosure, Certainty and Predictability

The Second Circuit concluded that absent this subjective test of tender offer withdrawal, Section 14(d)(7) "would [be] com-

pletely undermine[d]" by a tender offeror's private purchases of stock after terminating a tender offer. 850 F.2d at 944. There is absolutely no authority for this proposition.

In fact, the SEC's position is directly to the contrary. Recognizing that neither Section 14(d)(7) nor its own rules "provide[s] for the integration of purchases by a bidder . . . after its termination [of a tender offer] with those purchases made by such bidder pursuant to the other tender offer," the SEC proposed – but did not adopt – two rules that would have integrated purchases by a tender offer in this situation. Release No. 15,548 1979 Fed. Sec. L. Rep. (CCH) ¶ 81,935 at 81,229-30 (1979). First, proposed Rule 14d-8 would have integrated purchases made within 40 days after withdrawal of a tender offer into the tender offer for purposes of Section 14(d)(7). *Id*. Second, proposed Rule 14d-11 would have instituted a "cooling off" period after discontinuation or termination during which time a bidder could not purchase stock. Exchange Act ReleaseNo. 24,976, 39 SEC Docket 350,358 (Oct. 1, 1987).[9] It is fundamental that the SEC "would scarcely have proposed [these rules] if [such behavior] w[ere] already unlawful." *Fogel v. Chestnutt*, 533 F.2d 731, 752 n.25 (2d Cir. 1975) (Friendly, J.), *cert. denied*, 429 U.S. 824 (1976). The Second Circuit cannot ignore the choice made by Congress and the SEC. *See SEC v. Sloan*, 436 U.S. 103, 117 (1978) (statute "cannot be judicially . . . extended simply by doubtful arguments as to the need for a greater [scope] than it allows. If extension . . . is desirable, the proper source . . . is Congress"); *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir. 1985) ("it would be unwise for courts judicially to usurp what is a legislative or regulatory function by substituting [their] judgment for that of Congress or the SEC").

As this case illustrates, there are a myriad of provisions, both state and federal, fully protecting investors in the securities markets. But though nothing is gained from the Second Circuit's novel application of Section 14(d)(7), much is lost. Uncertainty

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[9] By focusing on the elapsed time between termination and subsequent purchases, the Second Circuit has now, in fact, legislated a cooling off period. *See* Second Circuit Opinion, 850 F.2d at 945.

and unpredictability have been injected into the tender offer process, making administration of and adherence to the Williams Act more difficult.

1. There Is No Need Judicially To Expand The Scope Of Section 14(d)(7)

Section 14(d)(7) is just one narrow part of a complex and integrated regulatory scheme and, as such, guards against a very specific harm. But there is no need to extend the protection of Section 14(d)(7). The evil that the Second Circuit identified – repeated announcements and terminations of offers – certainly would be addressed by other provisions of the Act. These other provisions include Section 9, prohibiting manipulation of security prices, and Sections 10(b) and 14(e), prohibiting fraud in the purchase or sale of securities and in connection with tender offers. The pattern of conduct hypothesized by the court, *see* 850 F.2d at 944, could be dealt with by application of any of those sections. Judicial expansion of Section 14(d)(7) is unnecessary.

This Court has in the past warned against this type of unfounded expansion of the securities laws. In *Pinter v. Dahl*, 108 S. Ct. 2063 (1988), this Court was urged to adopt a lower court gloss on the word "seller" as used in 12 of the Securities Act of 1933. The plaintiff wanted "seller" to be read as meaning one "whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place." *Id.* at 2080.

In rejecting this interpretation of the statute, the Court said:

> The deficiency of the substantial-factor test is that it divorces the analysis . . . from any reference to the applicable statutory language and from any examination of . . . the total statutory scheme . . . . [N]o congressional intent to incorporate tort law doctrines of reliance and causation . . . emerges from the language or the legislative history of the statute . . . . By injecting these concepts into § 12(1) litigation, the substantial-factor test introduces an element of uncertainty into an area that demands certainty and predictability.

Id. at 2081 (citations omitted). Here, the Second Circuit analysis is completely divorced from the language of both Section 14(d)(7) and Rule 14d-2. The court focuses on the "genuine in-

tent to abandon," a phrase that cannot be found in the statute, rule or legislative history. By ignoring the other provisions of the securities laws, the court failed to examine the "total statutory scheme." Moreover, the Second Circuit failed to cite to – or even look at – the legislative history. Had the Second Circuit looked to the legislative history, it would have seen, as the commentators have, that "Senator Williams made explicit his intention that . . . negotiated purchases not be subject to . . . § 14(d)(6). 113 Cong. Rec. 856 (1967). Presumably, the same reasoning would bar the application of 14(d)(5)-(7) to these types of transactions." Note, *The Developing Meaning of "Tender Offer,"* 86 Harv. L. Rev. 2063, 2076 (1973).

2. The Lower Court's Decision Will Lead To Unpredictable And Uncertain Results

The Second Circuit found that Petitioners made full disclosure of the events surrounding the negotiations and agreements at issue here. It is peculiar, to say the least, to construct a securities law violation founded upon the tender offeror's subjective intent where full disclosure has been made. It is, indeed, destructive of the purposes of the Act.

This Court's decision in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), makes clear that the Second Circuit lost sight of the overall purpose of the law. *Schreiber* involved a tender offeror, Burlington Northern, Inc. ("Burlington"), which reached accommodation with the target company, El Paso Gas Co. ("El Paso"), after commencing its offer. In order to facilitate this accommodation, Burlington entered into so-called "golden parachute" agreements with El Paso's management. As a result, Burlington and El Paso entered into a merger agreement calling for the termination of the tender offer and the simultaneous commencement of a second offer less advantageous to El Paso's shareholders. Burlington also purchased more than four million El Paso shares from El Paso – shares that it would otherwise have purchased from shareholders. In response to a suit under Section 14(e), Burlington merely responded that all its actions were fully disclosed. The Second Circuit would certainly find the simultaneous termination of one offer and commencement of a second to be ineffective and in violation of the statute. Burlington clearly never abandoned its

intent to gain control of El Paso. And since in this case the Court of Appeals agreed that full disclosure had been made, that would be apparently no defense.

But on the above facts in *Schreiber*, this Court dismissed the Section 14(e) claim and recognized that the emphasis placed on disclosure by Congress in the Williams Act is, in part, motivated by a desire for certainty and predictability in the marketplace.

> Inviting judges to read the term "manipulative" with their own sense of what constitutes "unfair" or "artificial" conduct would inject uncertainty into the tender offer process. An essential piece of information – whether the court would deem the fully disclosed actions of one side or the other to be "manipulative" – would not be available until after the tender offer had closed. This uncertainty would directly contradict the expressed congressional desire to give investors full information.

Schreiber v. Burlington Northern Inc., 472 U.S. at 12. Other circuit courts have recognized the importance of certainty and predictability in securities regulation. In *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 953 (9th Cir. 1985), the court rejected a proposed test of what constitutes a tender offer. The Ninth Circuit rejected the test because it was "vague and difficult to apply . . . [and] offers little guidance to the issuer as to when his conduct will come within the ambit" of the securities laws. *Id.* at 953.

The Second Circuit would have done well to heed the Ninth Circuit's concern that under the proposed test "[a] determination of the existence of a tender offer . . . is *largely subjective and made in hindsight* based upon an *ex post facto* evaluation . . . ." *Id.* (emphasis added). *See also Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1370 (N.D. Tex. 1979) ("in the commercial world, predictability of judicial result has a value that rivals abstract correctness of result. Able managers can live with reasonably clear standards – but no player in the take-over game benefits from vague post-hoc guidelines"); *Brascan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773, 791 (S.D.N.Y. 1979) ("application of so vague a test would intro-

duce a crippling uncertainty in an area in which practitioners should be entitled to be guided by reasonably clear rules of the road").

Most recently, the Third Circuit prefaced its analysis of the Williams Act by noting that:

> this is an area of the law in which predictability is of crucial importance. The regulations are provided for the guidance of those seeking to comply with the law and it would be a serious mistake to reach a result in this case of which the regulations do not give fair notice. Thus, we must be constrained by a fair reading of the text of the regulations even if we might reach a different result were we charged with the responsibility of promulgating regulations to implement the Williams Act.

City Capital Assocs. Ltd. Partnership v. Interco, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,065 at 90,971 (3d Cir. Oct. 20, 1988).[10]

Although tender offers are always national in scope, the fundamental question of whether an offer has been commenced or terminated now depends on the court in which the offer is challenged. To determine whether an announcement concerning a tender offer is effective, those involved must not only decide whether the tender offeror's intent is genuine, but also whether

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10 The unpredictable results that so concern this Court and the circuit courts have already begun as a result of the Second Circuit's decision. In *Feder v. MacFadden Holdings, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,059 at 90,94647 (S.D.N.Y. Oct. 11, 1988) shareholders of a target company sued a tender offeror under Sections 10(b), 14(d)(7) and 14(e). Plaintiffs alleged that the tender offeror had purchased their shares for $25 per share pursuant to one tender offer and had then, one week later, commenced a second tender offer at $30 per share. The district court dismissed the Sections 10(b) and 14(e) claims, but not the Section 14(d)(7) claim.

The district court realized that it was faced with a fact situation similar to *Brill v. Burlington Northern*, 590 F. Supp. 893 (D. Del. 1984), arising out of the same facts as *Schreiber*. In *Brill* the district court rejected a plea that Burlington Northern's two offers be integrated in order to create a Section 14(d)(6) proration violation. The district court understood that the principles announced in *Brill* would also cause dismissal of *Feder*. However, compelled by this case, the district court rejected *Brill*.

the court that ultimately decides the question will follow the SEC, *Schreiber* and *Brill* in rejecting integration, or will follow *Field v. Trump* in investigating the offeror's subjective intent. This is a problem that this Court should address – indeed, that only this Court can address.

C. The Second Circuit's Subjective Approach Raises Numerous Questions As To Its Application To Other Factual Settings

The uncertainty caused and the ancillary questions raised by the Second Circuit's opinion are dramatically illustrated by applying the opinion to the following actual tender offer situations taken from published opinions.

- *SCM Corp.* – Hanson Trust PLC commenced a tender offer to gain control of SCM. The terms of the offer gave Hanson the right to terminate the offer if SCM entered into a so-called "lock- up" arrangement, and to purchase shares after termination. After SCM and Merrill Lynch entered into a merger agreement with lock-up provisions, Hanson terminated its offer and then, within hours, purchased 25% of SCM's shares through private transactions and on the open market. This allowed Hanson to block the merger with Merrill Lynch and ultimately forced SCM to negotiate with Hanson.

SCM sued Hanson claiming that Hanson's post-termination purchases should be integrated into the tender offer. The Second Circuit agreed that Hanson's private purchases suggested it had not abandoned its ultimate goal of acquiring SCM, but nevertheless rejected integration. *See Hanson*, 774 F.2d at 60. Perhaps Hanson's termination of its offer would now be invalid, but how would investors, SCM or Merrill Lynch know that during the fast-paced tender offer process when they have to decide – without benefit of hindsight – what to do with their shares? Should investors have refused their shares when Hanson tried to return them, in the hope that eventually they would be paid because Hanson had made other purchases? Was Hanson legally obligated to pay for the tendered shares, and if so, at what price? Were those who sold to Hanson after the termination subject to liability – as the complaint alleges the Stroums

are here? Should the fact that Hanson acquired only 25% of the shares – a percentage too low to create a controlling interest- – change the analysis, or must the courts delve into Hanson's purpose in buying that amount of stock?

- *FREUHAUF CORP.* The Edelman Group and Merrill Lynch each had commenced tender offers for control of Freuhauf. In a settlement, Merrill bought Edelman's previously acquired Freuhauf shares and paid Edelman's fees and expenses. Both offerors then terminated their offers. On the same day the settlement was completed, Merrill made a second, increased bid for Freuhauf. The Freuhauf Board accepted Merrill's offer, which commenced several days later.

Under the Second Circuit's approach, it is doubtful that Merrill effectively terminated its first offer. Both the settlement with Edelman and its quick bid seem to be good evidence that it never genuinely abandoned its goal of acquiring control of Freuhauf. This conclusion is bolstered by the fact that Merrill purchased Edelman's acquired shares in the same settlement in which it agreed to drop its tender offer. In a law suit arising out of this matter, the court relied, in part, on the fact that the second Merrill offer did not commence until several days after the purported withdrawal. *See Priddy v. Edelman*, 679 F. Supp. at 1432. Under the Second Circuit's test, "several days" seems like a short time. In any event, though the second offer was not commenced for several days, Merrill announced the new offer on the same day as the alleged termination. The Second Circuit would most likely consider the announcement proof of the continuation of the first offer and find that the transaction violated Section 14(d)(7).

The uncertainty created by the Second Circuit's subjective test is contrary to the certainty and predictability required by the securities laws. Indeed, the circuit court's opinion divests the very rules upon which plaintiff relies of all certainty and makes the fundamental question of whether the requirements of the act apply a matter of guess-work. This was certainly not the intent of the SEC, which promulgated a simple rule to help investors know when the protections of the act applied. Neither was it the intent of Congress, which relied on full disclosure and a certain body of law to protect investors.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 419 August Term, 1987

(Argued January 6, 1988) Decided

Docket No. 87-7578

BERTRAM FIELD,
Plaintiff-Appellant,

v.

JULIUS TRUMP, EDDIE TRUMP, STUART M. SLOAN, SAMUEL N. STROUM, M. LAMONT BEAN, FENWICK CRANE, E. RONALD ERICKSON, CALVIN HENDRICKS, ROBERT B. HUTCHINSON, EARL W. SMITH, RAYMOND C. SWANSON, PAY'N SAVE CORPORATION, THE TRUMP GROUP, LTD., NLAC CORP., ACQUICORP, INC., MERGICORP, INC., TGAC CORP. and TG LIMITED,
Defendants-Appellees.

B e f o r e: VAN GRAAFEILAND, WINTER and ALTIMARI, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*) dismissing, under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), plaintiff's amended class-action complaint. The district court dismissed plaintiff's claim brought under Section 14(d)(7) of the Securities Exchange Act of 1934 holidng that a purported withdrawal of a tender offer was effective even though the withdrawal was followed within

a few hours by acquisition of an option to purchase a large block of the stock subject to the tender offer, and therafter by an announcement of a purportedly new tender offer. The district court also held that plaintiff had failed to state claims under RICO or under Sections 10(b), 14(a) and 14(e) of the '34 Act, and Rules 10b-5, 10b-13 and 14a-9 thereunder. We reverse the dismissal of plaintiff's claim under Section 14(d)(7) but affirm the dismissal of the remanining federal claims.

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WINTER, *Circuit Judge*:

The legal issues in this appeal concern the meaning of the so-called "best-price rule" of Section 14(d)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(7) (1982), and the disclosure obligations of a publicly held company under that Act.

Accepting the allegations of the complaint as true, this dispute arises from a leveraged buy-out in which defendants Julius and Eddie Trump, through corporations they owned and controlled, commenced a tender offer at a price of $22.50 per share for shares of defendant Pay'n Save Corporation, a Washington state corporation. Shortly after the market closed on the fourth business day after the announcement of the tender offer, the Trumps "withdrew" the offer in order to arrange a purchase of a bloc of shares from certain dissident directors. Later that night, after acquiring an option to purchase the dissidents' shares, the Trumps announced a "new" tender offer at $23.50 per share. When the price of the option and a side payment for "fees and expenses" is taken into account, the dissidents received $25.00 per share, a $1.50 premium over the price paid to the tendering shareholders.

Bertram Field subsequently brought this class action in the Southern District against the Trumps, their firms, Pay'n Save and its officers and directors. The amended complaint alleged that the agreement between the Trumps and the dissident directors violated Section 14(d)(7), commonly known as the "best-price" provision of the Williams Act, and SEC Rule 10b-13. 17 C.F.R. § 240.10b-13 (1987). In addition, the complaint alleged that various documents relating to the tender offer, and an earlier Pay'n Save proxy statement, contained material omissions, in violation of Sections 10(b), 14(a) and 14(e) of the '34 Act, 15 U.S.C. §§ 78j(b), 78n(a), (e) (1982), Rules 10b-5 and 14a-9 thereunder, 17 C.F.R. §§ 240.10b-5, 14a-9 (1987), and, of course, by extension, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), (d) (1982). Field alleged pendent state-law claims as well.

Judge Goettel dismissed the amended complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Field v. Trump*, 661 F. Supp. 529 (S.D.N.Y. 1987). The district court held that plaintiff did not state a claim under Section 14(d)(7) because the Trumps had announced an effective withdrawal of their tender offer before they struck their deal with the dissident directors, *id.* at 532, and that plaintiff was not a proper party to invoke Rule 10b-13. *Id.* at 533. The district court also dismissed the nondisclosure counts on the ground that they were attempts to bootstrap state-law fiduciary-duty claims into a federal securities-law action. Finally, Judge Goettel found that the complaint failed to allege a "pattern of racketeering activity" under RICO. We reverse the dismissal of the Section 14(d)(7) claim and the pendent state claims but otherwise affirm.

BACKGROUND

According to the amended complaint, the allegations of which we must accept as true, this dispute originates in Pay'n Save's acquisition of Schuck's Auto Supply, Inc. in January 1984. That transaction left the former owners of Schuck's, defendants Samuel N. Stroum and Stuart M. Sloan and members of their families ("Stroums" or "Stroum Group"), holding 18.4% of Pay'n Save's outstanding common stock. The Stroums were not happy shareholders, however, and had their own ideas about how to run Pay'n Save. Looking for ways to pacify the Stroums, Pay'n Save management sought and obtained a standstill agreement dated March 30, 1984. The Stroums agreed not to sell or otherwise dispose of their shares, or to offer to purchase Pay'n Save. In return, Stroum and Sloan received seats on the company's board.

Friction between the Stroums and management nevertheless continued. As a result, management retained Kidder Peabody and later Merrill Lynch Capital Markets to find a purchaser for the company. To the same end, defendant Calvin Hendricks, Pay'n Save's Chief Financial Officer and Vice-Chairman of its board, undertook discussions with Eddie Trump, President of the Trump Group, Ltd., about acquiring Pay'n Save. According to its subsequent Offer to Purchase, the Trump Group took the

position that it "would only consider an acquisition of the company if management would participate in the equity of the resulting entity." Offer to Purchase at 4. Management agreed, and on August 31 the Trumps proposed to the Pay'n Save board a cash tender offer at $22.00 per share for two-thirds of the company's outstanding shares, to be followed by a cash-out merger at the same price. One week later, in the early morning hours of a late-night Pay'n Save board meeting, the Trumps raised their offer to $22.50 but warned that it would be withdrawn if it were not approved. Merrill Lynch opined that $22.50 was a fair price, and a majority of Pay'n Save's board approved it. Stroum and Sloan dissented. That morning, September 7, 1984, Pay'n Save issued a press release announcing that it had reached a merger agreement with the Trumps and that the Trumps were initiating a tender offer at $22.50. In a statement of their own, the Stroums called the Trump offer "skimpy" and accused management of acting in "unseemly haste."

During the next few days, according to the Offer to Purchase, "Eddie Trump contacted Messrs. Stroum and Sloan and the parties had several conversations concerning the possibility of settling the objections of Messrs. Stroum and Sloan to the Transactions." Offer to Pruchase at 6. At 5:10 p.m. on September 12, after a meeting between the Trumps, Stroum and Sloan, the Trumps told Pay'n Save's board that they were withdrawing their previously announced tender offer in order "too facilitate the negotiations with Messrs. Stroum and Sloan." *Id.* The Trumps also issued a press release announcing both the withdrawal of their tender offer and their negotiations with the Stroums. These negotiations quickly bore fruit. Late that night, the Trumps and the Stroums entered into a Settlement Agreement under which the Trumps paid the Stroums $3,300,000 for an option to purchase the Stroums' shares at $23.50 per share. In addition, the Trumps paid the Stroums $900,000 for the Stroums' "fees and expenses." The Settlement Agreement was subject to the Pay'n Save board's approval of an amendment to the September 7 merger agreement that would provide for an increased price of $23.50 per share for the tender offer and merger. The $4,200,000 payment (option price plus "fees and expenses"), when added

to the $23.50 per share purchase price, amounted to a price of $25.00 per share for the Stroums.

The next day, September 13, the Pay'n Save board approved the amendment to the merger agreement, and Pay'n Save issued a press release announcing that the Trumps would soon proceed with a tender offer at the new $23.50 price. According to the complaint, the press release announcing the new price and the September 12 press release announcing the "withdrawal" reached the public simultaneously.

Claiming to have been a Pay'n Save shareholder who tendered shares of $23.50, a $1.50 less than the price paid to the Stroums, plaintiff brought this putative class action against Pay'n Save, its officers (M. Lamont Bean, Chairman of the Board and Chief Executive Officer; E. Ronald Erickson, President and Chief Operating Officer; and Calvin Hendricks, Vice Chairman of the Board and Chief Financial Officer), its pro-management directors (Fenwick Crane, Raymond C. Swanson, Robert B. Hutchinson and Earl W. Smith), the dissident directors (Stroum and Sloan), and the Trumps and their affiliated entities (Eddie Trump, Julius Trump, the Trump Group, Ltd., NLAC Corp., Acquicorp, Inc., Mergicorp, Inc., TGAC Corp. and TG Limited).

Count I of the complaint alleged that the $4,200,000 received by the Stroums constituted a premium of $1.50 per share above the price received by other shareholders, in violation of Section 14(d)(7) and Rule 10b-13. Count II alleged that the Trumps' Offer to Purchase and an earlier Pay'n Save proxy statement contained various omissions of material facts, in violation of Sections 10(b) and 14(e) of the '34 Act and Wash. Rev. Code § 21.20.010 (1978). Count III alleged that Pay'n Save's officers and directors had conducted, and had conspired to conduct, the affairs of Pay'n Save through a pattern of racketeering activity, in violation of RICO, 18 U.S.C. § 1962(c) and (d). Finally, Count IV alleged that, under the common law of the State of Washington, Pay'n Save's officers and directors had committed various breaches of their fiduciary duties of loyalty and care in connection with the sale of Pay'n Save.

DISCUSSION

1. *The Section 14(d)(7) Claim*

Plaintiff's principal claim arises under Section 14(d)(7) of the Williams Act, the so-called "best-price" provision, which states that:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

15 U.S.C. § 78n(d)(7). The purpose of this provision is to prevent a tender offeror from discriminating in price among tendering shareholders. The position taken by the SEC thus is that:

> (i) a tender offer must be extended to all holders of the class of securities which is the subject of the offer (the "all-holders requirement"); and (ii) all such holders must be paid the highest consideration offered under the tender offer (the "best-price rule").

Proposed Amendments to Tender Offer Rules, Securities Act Release No. 6595 [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶83,797 (July 1, 1985). To codify the "all-holders requirement" and "best-price rule," the SEC has adopted Rule 14d-10, 17 C.F.R. § 240.14d-10 (1987), which provides in pertinent part:

> (a) No bidder shall make a tender offer unless:
>
> (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and
>
> (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

To the same end, the SEC has promulgated a rule prohibiting side transactions involving purchases of securities subject to a tender offer. Rule 10b-13 thus provides in pertinent part:

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected.

The essence of plaintiff's claim is that the $4,200,000 paid to the Stroums during the brief "withdrawal" of the offer was in law and fact a payment of a $1.50 per share premium intended to induce the Stroums to accept the tender offer. The failure to pay this premium to the other tendering shareholders, plaintiff argues, violated the "best-price rule."

No party disputes the proposition that payment of a premium to one shareholder and not others during a tender offer is illegal. The issue rather is whether the purported withdrawal effectively ended the offer so that the $4,200,000 payment was not during or part of a tender offer. In dismissing the Section 14(d)(7) claim, the district court relied upon SEC rules governing the commencement of a tender offer, specifically Rule 14d-2(b), which provides that:

> [a] public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section [namely, the identity of the bidder and the target, the amount and class of the securities sought, and the price to be paid] with respect to a

> tender offer . . . shall be deemed to constitute the commencement of a tender offer [for the purposes of Section 14(d) and rules promulgated thereunder] *Except*, That such tender offer shall not be deemed to [have commenced under this section] on the date of such public announcement *if within five business days of such public announcement, the bidder . . . [m]akes a subsequent public anouncement stating that the bidder has determined not to continue with such tender offer*. . . .

17 C.F.R. § 240.14d-2(b) (1987) (emphasis added). Thus, while the public announcement of the essential terms of a tender offer results in the technical "commencement" of a tender offer, the offer will nevertheless be legally deemed not to have commenced if its withdrawal is announced within five business days. In the instant case, the initial announcement of the Trumps' tender offer came on the morning of Friday, September 7, 1984, and the purported withdrawal was announced on the afternoon of Wednesday, September 12, four business days later. Based on these facts, the district court concluded that, for purposes of Section 14(d)(7), "there was no tender offer in place at the time of the Settlement Agreement, and thus, as a matter of law, no violation of [that] Section." 661 F. Supp. at 532. We disagree, however, and believe that the allegations of the complaint state a claim under the Williams Act.

The Williams Act does not define "tender offer." Courts faced with the question of whether purchases of a corporation's shares are privately negotiated or are part of a tender offer have applied a functional test that scrutinizes such purchases in the context of various salient characteristics of tender offers and the purposes of the Williams Act. *SEC v. Carter Hawley Hale Stores*, 760 F.2d 945, 950 (9th Cir. 1985); *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 56-57 (2d Cir. 1985) (eight factor "test"; balancing of factors in particular case determined in light of Act's policy to protect ill-informed solicitees). Whether the acquisition of shares in a corporation is part of a tender offer for purposes of the Act cannot be determined by rubber-stamping the label used by the acquiror. *Wellman v. Dickinson*, 475 F.

Supp. 783, 823-25 (S.D.N.Y. 1979) (so-called "privately negotiated" purchases of shares constitute tender offer for purposes of Williams Act); *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983). Were the label used by the acquiror determinative, virtually all of the provisions of the Williams Act, including the filing and disclosure requirements could be evaded simply by an offeror's announcement that offers to purchase of stock were private purchases. *Id.*

Similarly, giving effect to every purported withdrawal that allows a discriminatory premium to be paid to large shareholders would completely undermine the "best-price rule." For example, plaintiff has alleged that the purported withdrawal of the original tender offer was intended solely to allow the Trumps to pay a premium of $1.50 per share of the Stroums that was not offered to shareholders who tendered pursuant to the "new" tender offer announced immediately thereafter.[1] The "best-price rule" of Section 14(d)(7) and Rule 14d-10 is completely unenforceable if offerors may announce periodic "withdrawals" during which purchases at a premium are made and thereafter followed by "new" tender offers. Unless successive tender offers interrupted by withdrawals can in appropriate circumstances be viewed as a single tender offer for purposes of the Williams Act, the "best-price rule" is meaningless.

Whether the purchase of the Stroum shares was a private purchase or part of a continuing tender offer is not determined simply by the Trumps' use of the labels "withdrawal" and "new" offer. *Cf. McDermott, Inc. v. Wheelabrator-Frye, Inc.*, 649 F.2d 489 (7th Cir. 1980) (announcement of increase in number of shares sought not new tender offer). Indeed, we have explicitly recognized that purchases after a purported withdrawal of a tender offer may constitute a continuation of the offer in light of the surrounding circumstances. *Hanson Trust*, 774 F.2d at 58-59. Finally, Section 14(d)(7) itself explicitly treats a material change in the terms of a tender offer in the form of an increased price as a continuation of the original offer rather than as a new tender offer. Clearly, therefore, purchases of shares by an offeror after a purported withdrawal of a tender offer may constitute a continuation of the original tender offer.

Rule 14d-2(b) is not to the contrary. That Rule merely creates a window of time during which a genuine withdrawal leaves matters for all legal purposes as though a tender offer had never been commenced. The Rule does nothing to alter the principle that the mere announcement of a withdrawal may not be effective if followed by purchases of shares and other conduct inconsistent with a genuine intent to withdraw. The Rule is also irrelevant because a bidder is always free to withdraw a tender offer. The argument advanced by defendants, if correct, would thus apply even in cases in which the provisions of Rule 14d-2(b) governing withdrawal announcements did not.[2]

For purposes of the "best-price rule," therefore, an announcement of a withdrawal is effective when the offeror genuinely intends to abandon the goal of the original offer. *See id.* (termination of tender offer effective in light of evidence that goal of obtaining control of target corporation was abandoned). The complaint here alleges that the Trumps' Offer to Purchase explicitly stated that the purported withdrawal was intended to allow negotiations with the Stroums. Such negotiations indicate a continuing intent to obtain control of Pay'n Save.

Moreover, the complaint alleges conduct from which inferences might be drawn that the Trumps had not abandoned the goal of the original offer. In determining the most appropriate analysis for evaluating the conduct of an offeror surrounding a purported withdrawal, we draw upon a suggestion of Professor Loss. He has noted that the determination of whether formally separate offerings of securities should be "integrated," and thus considered a single offering, for the purposes of the various registration exemptions, is closely analogous to the question of whether single or multiple tender offers have been made. L. Loss, *Fundamentals of Securities Regulations* 577 n.33 (1983) (suggesting comparison of " 'integration' problem with respect to certain exemptions under the 1933 Act" with Section 202(166)(B) of the ALI's proposed Federal Securities Code, which "treats [tender] offers as separate if they are for different classes of securities or are 'substantially distinct on the basis of such factors as manner, time, purpose, price and kind of consideration' ").

In establishing criteria to govern the integration of formally separate offerings, the SEC has identified the following factors, *inter alia*, as relevant: "(1) are the offerings part of a single of financing; (2) do the offerings involve issuance of the same class of security; (3) are the offerings made at or about the same time . . .?" Section 3(a)(11) Exemption for Local Offerings, Securities Act Release No. 4434 (Dec. 6, 1961). Analogous factors may thus point to "integration" in the context of formally separate tender offers: (1) are the offers part of a single plan of acquisition; (2) do the offers involve the purchase of the same class of security; and (3) are the offers made at or about the same time? These factors are useful in determining the ultimate fact of whether an offeror has abandoned the goal of an initial tender offer in announcing a withdrawal of that offer. As previously noted, where the goal has not been abandoned, a purported withdrawal followed by a "new" offer must be treated as a single continuing offer for purposes of the "best-price rule."

Accepting as true the facts alleged in plaintiff's complaint, all of the listed factors weigh in favor or treating the Trumps' acquisition of Pay'n Save shares as a single tender offer. If the allegations are proven, the alleged $1.50 premium to the Stroums would violate Section 14(d)(7).

The parties and the district court have correctly assumed that Section 14(d)(7) impliedly affords a private right of action to shareholders. In *Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.), *cert. denied*, 107 S. Ct. 445 (1986), we held that the best-price provision's statutory neighbor, Section 14(d)(6) of the '34 Act, 15 U.S.C. § 78n(d)(6) (1982), which requires pro rata acceptance of tendered shares in oversubscribed offers, could be privately enforced. Section 14(d)(7) certainly provides at least as strong a basis for the implication of a private remedy as does Section 14(d)(6). As in *Pryor*, the plaintiff here is "surely [one of] the primary intended beneficiaries of [the statute], since 'the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer.' " 794 F.2d at 57 (quoting *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 35 (1977)). Moreover, Section 14(d)(7), like Section 14(d)(6) and "unlike the bulk of

federal securities regulation, confers a substantive right on [its] beneficiaries," thereby "suggest[ing] that Congress intended to create a private right of action." *Id.* In addition, as is true of the proration provision, a private damage action provides a particularly effective means of enforcing the strictures of the "best-price rule." When a premium is paid to one shareholder in violation of Section 14(d)(7), "the injury is easy to calculate, the victims are easy to locate, and the likelihood of litigation by such victims is high if a private right of action exists." *Id.* at 58. Finally, a cause of action under Section 14(d)(7) is not one "traditionally relegated to state law." *Id.* (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Accordingly, we hold that Section 14(d)(7) affords private plaintiffs an implied right of action, and we therefore reverse the dismissal of the Section 14(d)(7) claim.[3]

2. *The Nondisclosure Claims*

Count II of the amended complaint alleged that the various documents relating to the Pay'n Save tender offer and merger, and an earlier Pay'n Save proxy statement, contained various omissions of material facts in violation of Sections 10(b), 14(a) and (e) of the '34 Act, and Rules 10b-5 and 14a-9. As the district court noted, most of these claims essentially allege that Pay'n Save's officers and directors breached their fiduciary duties of loyalty and care under Washington law and failed to disclose these breaches. For example, plaintiff alleged that the defendants had failed to disclose the following "material facts":

> — "Value for the shareholders might have been . . . maximized if the Stroums . . . had been approached, as a potential acquirer."
>
> — "The Standstill Agreement . . . significantly restricted [Pay'n Save's] potential for maximi[z]ing value for its shareholders."
>
> — "The Stroums . . . might have been interest[ed] in acquiring all of the Company . . . but were prevented from doing so because Management and [the] Directors had . . . refused to approach them."
>
> — "Neither Management nor [the] Directors made any effort at all to obtain for the [plaintiff] Class, the

> Premium paid to the Stroums, . . . to obtain an independent and written legal opinion . . . as to [the] validity [of the withdrawal], . . . to adequately inform themselves of the advisability of entering into the Merger Agreement . . ., to adequately inform themselves as to, or to determine what would constitute, a fair premium to the public shareholders . . ., [and] to obtain $25 per share for the public shareholders . . . ."

Amended Complaint ¶¶54-55, 59 (emphasis omitted).

In *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977), the Supreme Court refused to construe Section 10(b) to prohibit "instances of corporate mismanagement . . . in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." The Court held that Section 10(b), as its plain language suggests, prohibits only conduct "involving manipulation or deception," *id.* at 473, manipulation being "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artifically affecting market activity," *id.* at 476, and deception being "misrepresentation, or nondisclosure" intended to deceive. *Id.* Similarly, in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7-8 (1985), the Court rejected the contention that "manipulative" conduct under Section 14(e) differed in scope from conduct deemed manipulative in *Santa Fe* under Section 10(b). The Court observed that "the three species of misconduct" targeted under both sections, namely " 'fraudulent, deceptive, or manipulative' " acts, "are directed at failures to disclose." *Id.* at 8 (citing 15 U.S.C. § 78(n)(e)). The Court accordingly held that "the term 'manipulative' as used in [Section] 14(e) requires misrepresentation or nondisclosure," and "connotes 'conduct designed to deceive or defraud investors by controlling or artifically affecting the price of securities.' " *Id.* at 12 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)).

The Court in *Schreiber* did not, as it had in *Santa Fe* with respect to Section 10(b), express concern that the extension of Section 14(e) to conduct not involving misrepresentation or

nondisclosure might "interfere with" or "federalize" state corporate law. *Santa Fe*, 430 U.S. at 479. Yet, as *Schreiber's* reliance on *Santa Fe* suggests, the policy against overriding state corporate law absent a clear indication of contrary congressional intent applies with equal force to Section 14(e). In anticipating *Schreiber* in *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), we refused to "embark . . . on a course leading to a federal common law of fiduciary obligations." *Id.* at 4; *see also Lewis v. McGraw*, 619 F.2d 192 195 (2d Cir.) (per curiam), *see also Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir.) (per curiam), *cert. denied*, 449 U.S. 951 (1980). Similarly, we have implicitly expressed our disapproval of the use of Section 14(a) and Rule 14a-9 "as an avenue for access to the federal courts in order to redress alleged mismanagement or breach of fidicuary duty." *Maldonado v. Flynn*, 597 F.2d 789, 796 (2d Cir. 1979). We noted further in *Maldonado* that

> [e]fforts to dress up [state-law claims] in a § 14(a) suit of clothes have consistently been rejected, including allegations of failure to disclose a disputed legal theory regarding the legality of transactions approved by the board, failure to disclose an alleged ulterior motive for a fully described corporation action, or failure to disclose lack of skill or judgment in approving a transaction intended for the corporation's benefit.

Id. (citations omitted). Other courts have taken similar positions with respect to Section 10(b) and Rule 10b-5. *See, e.g., Kas v. Financial Gen. Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986) ("plaintiff may not 'bootstrap' a claim of breach of fiduciary duty into a federal securities law claim by alleging that directors failed to disclose that breach of fiduciary duty"; "if the validity of a shareholder's claim of material misstatement or nondisclosure rests solely on a legal determination that the transaction was unfair to a minority shareholder or that an officer or director's conduct amounted to a breach of his fiduciary duty, the claim does not state a cuase of action under sections 10(b) or 14(a)"); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 287-89 (7th Cir.) (same under Section 10(b)), *cert. denied*, 454

U.S. 1092 (1981); *Biesenbach v Guenther*, 588 F.2d 400, 402 (3d Cir. 1978) (same, Section 10(b)).

Language in Judge Friendly's opinion *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978), case not cited by the plaintiff, qualifies the broad proposition that there is no cause of action under Section 10(b) for non-disclosure of facts material only to support an action for breach of a fiduciary duty under state law. While conceding that some of the Court's statements in Part IV of *Santa Fe* squarely supported that proposition, Judge Friendly nevertheless stated:

> Thus the Court, quoting from *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 40, 97 S. Ct. 926, 51 L.Ed.2d 124 (1977), said that one factor in determining whether a case was covered by § 10(b) and Rule 10b-5, was " 'whether the cause of action [is] one traditionally relegated to state law . . . .' " But the Court quickly added, after referring to the Delaware appraisal statute, that "Of course, the existence of a particular state law remedy is not dispositive of the question whether Congress meant to provide a similar federal remedy," and it would be hard to think of a cause of action more "traditionally relegated to state law" than the one asserted in the *Superintendent of Insurance* case, which, as has been said, made "just plain stealing" a fraud under Rule 10b-5, on the basis that Begole failed to tell the directors "in advance that he was going to steal", *Jennings & Marsh, Securities Regulation* 997-98 (1977).

Several sentences later, however, he also stated:

> We readily agree that *if all that was here alleged was that UGO had been injured by "internal corporate mismanagement," no federal claim would have been stated. But a parent's looting of a subsidiary with securities outstanding in the hands of the public in a securities transaction is a different matter*; in such cases disclosure or at least the absence of misleading disclosure is required.

Id. at 220-221 (emphasis added).

We believe the following line to be drawn by our case. Allegations that a defendant failed to disclose facts material only to support an action for breach of state-law fiduciary duties ordinarily do not state a claim under the federal securities laws. Certainly this is true of allegations of garden-variety mismanagement, such as managers failing to "maximiz[e] value for . . . shareholders," Amended Complaint ¶54, of directors failing "to adequately inform themselves," *id.*, or of managers acting in a generally self-entrenching fashion. But where the remedy of an injunction is needed (and is available under state law) to prevent irreparable injury to the company from willful misconduct of a self-serving nature, disclosure of facts necessary to make other statements not misleading is required where the misleading statements will lull shareholders into forgoing the injunctive remedy.

In *Goldberg*, a parent corporation had transferred its assets and liabilities to a controlled subsidiary with public shareholders in exchange for more stock of the subsidiary. Contemporaneous press releases by the parent painted "an inviting picture . . . of the transaction," 567 F.2d at 214. However, the parent's liabilities exceeded the shareholders' net equity by some $10 million, and the transaction transformed the subsidiary from a financially healthy corporation to a firm impaired by a $3.6 million deficit in current liabilities unable to meet its obligations and finding its assets seized by creditors. *Id.* at 212. Although the parent's control of the subsidiary obviated the legal need for shareholder approval and the disclosure attendant to proxy solicitation, the parent's optimistic press release tended to dispel any suspicion of the transaction. Lack of information about the parent's true financial condition in turn caused the public shareholders of the subsidiary to forgo the opportunity to seek an injunction under state law to prevent irreparable injury to the company.

Goldberg also involved out-and-out "looting" and "stealing." Those facts did not require us to distinguish between conduct that is "reasonable" and "unreasonable," or "informed" and "uninformed," distinctions that are the hallmark of state fiduciary law. *Compare Maldonado*, 597 F.2d at 796

(criticizing use of Section 14(a) to redress mismanagement and breaches of fiduciary duty), *with Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650, 655 (2d Cir. 1979) (distinguishing *Maldonado* in light of "allegations of a cover-up of massive bribes and of kickbacks to directors"), *cert. denied*, 445 U.S. 951 (1980). There is no allegation in the present case of willful misconduct of a self-serving nature that called for injunctive relief lest Pay'n Save's shareholders be irreparably harmed. At best, plaintiff alleges that the directors failed to maximize the return to shareholders, and thus his claims are not actionable under Sections 10(b), 14(a) or 14(e).

This conclusion does not dispose completely of the federal claims in Count II, however, because some of the nondisclosure allegations go beyond descriptions of ordinary breaches of fiduciary duties. Specifically, paragraph "fifty-sixth" of the amended complaint alleges that

> The [Offer to Purchase and related documents] and the 1984 Proxy Statement were materially false and misleading in:
>
> • • •
>
> (2) Stating that the Stroums' Shares issued in the Schucks acquisition, were "valued at approximately $70 million" without disclosing the material fact that the Acquisition Price was equivalent to $25 per share.
>
> (3) Failing to disclose the interrelationship of Bean's [management's] Directors as alleged in Paragraph SEVENTH hereof, and in burying their identity in Annex G at the end of the Offer to Purchase.

Amended Complaint ¶56 (emphasis omitted). In determining whether these claims were properly dismissed under Rule 12(b)(6), we may of course refer to the Offer to Purchase and the 1984 Proxy Statement, which were annexed to defendants' motion to dismiss and are documents that are integral to plaintiff's claims. *See Furman v. Cirrito*, 828 F.2d 898, 900 (2d Cir. 1987); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 593 (1969); *id.* § 1364, at 668-73.

With regard to the allegations in subparagraph (2), the Offer to Purchase states in clear language that in January 1984, Pay'n Save bought Schuck's Auto Supply by issuing the Stroums 2,799,014 shares of Pay'n Save stock, and that under the terms of the exchange these shares were worth $70 million. The omission of the $25-per-share figure is not material in light of the fact that dividing the number of shares into $70 million would disclose a price of $25.01 per share. The defendants' failure to perform this calculation for investors cannot be said to have "significantly altered the 'total mix' of information" available to reasonable investors, *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), and thus does not constitute actionable nondisclosure. *See Datatab*, 722 F.2d at 5 (no further disclosure required where "conclusion obvious to anyone conversant with elementary mathematics").

Moreover, the only possible relevance of the per-share value of the stock issued to the Stroums would be to illumine for investors the possible motives of the Stroums in demanding a $25 per share price. Even assuming that a motive other than profit maximizing was relevant, the circumstances were amply disclosed. For example, immediately after describing the terms of the acquisition of Schuck's Auto Supply from the Stroums for shares expected to be worth $70 million, the Offer to Purchase states that "[a]fter issuance on January 27, 1984, however, such Shares [the shares issued to the Stroums] had a quoted value in the over-the-counter market of $56,680,034." Offer to Purchase at 3. That the Stroums might have been upset at the performance of their new investment is obvious. Indeed, the Offer to Purchase understandably points out that "differences over the management of the Company . . . developed after the closing of the transaction." *Id.* An explicit statement that the Stroums, pursuant to the fully-disclosed Settlement Agreement with the Trumps, effectively received the $25 per share they originally expected to receive in the Schuck's transaction, simply would not add anything material to the facts otherwise disclosed.

We turn now to subparagraph (3), which alleges first that the defendants failed to disclose the information described in

paragraph "seventh" of the amended complaint, namely various social and professional relationships among the officers and directors of Pay'n Save. These include, for example, the alleged facts that Raymond C. Swanson, a director and Secretary of Pay'n Save, was a member of a law firm that represented Pay'n Save; that some of the directors were also co-directors of another company; and that three of the directors had known M. Lamont Bean, the Chairman and Chief Executive Officer of Pay'n Save, socially for many years. *See* Amended Complaint ¶7. Such trivia, however, is immaterial as a matter of law, especially in light of the extensive disclosure of management and director stock ownership and the terms of management's participation in the leveraged buy-out. Finally, the other allegation in subparagraph (3) – that the defendants violated their disclosure obligations by "burying" the identity of the directors in Annex G to the Offer to Purchase – is frivolous as a matter of law. *See Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 267 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972).

3. *The RICO Claim*

The district court dismissed plaintiff's RICO claim on the ground that the alleged racketeering acts "were simply a series of events necessary to achieve a single objective, namely to take the company private," *Field v. Trump*, 661 F. Supp. at 535, and therefore did not establish a pattern under RICO. The plaintiff correctly argues that this legal conclusion is inconsistent with our decision in *United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). However, the defendants correctly respond that the result reached by the district court – dismissal – is entirely consistent with our decisions in cases such as *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988), which hold essentially that a scheme "carried out 'in pursuit of a single short-lived goal' " does not establish a RICO enterprise. *Beauford v. Helmsley*, 843 F.2d 103, 109 (2d Cir. 1988) (quoting *Creative Bath Prods., Inc. v. Connecticut Gen. Life Ins. Co.*, 837 F.2d 561, 564 (2d Cir. 1988)), *reh'g in banc granted* (Apr. 13, 1988). Nevertheless, because we have recently decided to rehear *Beauford* in banc "to clarify Second Circuit law," 843

F.2d at 109, we will affirm on a different ground. Because we have found that plaintiff has not stated a valid claim that the Offer to Purchase or 1984 Proxy Statement were materially misleading, it follows that the complaint does not allege securities fraud or mail fraud for the purposes of establishing a pattern of racketerring activity under RICO. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 19 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

CONCLUSION

For the above reasons, the dismissal of Counts II and III of the complaint are affirmed. The dismisal of Count I is reversed. Because the reversal on Count I may restore pendent jurisdiction over the state-law claims in Counts II and IV, the dismissal of those claims is also reversed.

Affirmed in part and reversed in part.

FOOTNOTES

[1] Whether the "fees and expenses" for which the Trumps paid $900,000 to the Stroums were actually incurred is irrelevant under the "best-price rule." Some or all of those sums were expended in order to obtain a premium for the Stroums, and it would thwart the purposes of Section 14(d)(7) to allow reimbursement. Moreover, we believe the "best-price rule" would be unworkable if offerors were permitted to discriminate among shareholders according to expenses that were not uniformly incurred, such as broker's or attorney's fees.

[2] Defendants have emphasized that "the public shareholders of Pay'n Save ultimately received $23.50 per share, or approximately $5.00 per share in excess of the market value of their shares on the last full trading date prior to the announcement of the proposed tender offer and merger." Appellees' Joint Brief at 2-3. They apparently wish to stress that application of the "best-price rule" where a payment of a premium above the offer to a large shareholder is necessary to consummate the transaction will ultimately work to the deteriment of shareholders generally by decreasing such transactions. This point, however, can be made about the Williams Act generally, *see, e.g., Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 262 (7th Cir. 1986) (citing Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J. Law & Econ. 371 (1980)), *rev'd on other grounds*, 107 S. Ct. 1637 (1987), and thus must be addressed to Congress.

[3] Because full relief is available to plaintiff under Section 14(d)(7), we need not address the claim asserted under Rule 10b-13. *Cf. Pryor*, 794 F.2d at 53; *see also Beaumont v. American Can Co.*, 797 F.2d 79, 83-84 (2d Cir. 1986) (expressing doubt that private right of action exists under Rule 10b-13)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30 day of August one thousand nine hundred and eighty-eight.

BERTRAM FIELD,

Plaintiff-Appellant,

v.

No. 87-7578

JULIUS TRUMP, EDDIE TRUMP, STUART M. SLOAN, SAMUEL N. STROUM, M. LAMONT BEAN, FENWICK CRANE, E. RONALD ERICKSON, CALVIN HENDRICKS, ROBERT B. HUTCHINSON, EARL W. SMITH, RAYMOND C. SWANSON, PAY'N'SAVE CORP., THE TRUMP GROUP, LTD, NLAC CORP., ACQUICORP, INC., MERGICORP, INC., TGAC CORP. AND TG LIMITED

Defendants-Appellees.

A petition for rehearing contasining a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees Trump et. al.

Upon consideration by the panel that heard the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been trasmitted to judges of the court in regular active service and to any other judge the heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith,

Clerk

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BERTRAM FIELD,

Plaintiff,

—against—

JULIUS TRUMP, EDDIE TRUMP, STUART M. SLOAN, SAMUEL N. STROUM, M. LAMONT BEAN, FENWICK CRANE, E. RONALD ERICKSON, CALVIN HENDRICKS, ROBERT B. HUTCHINSON, EARL W. SMITH, RAYMOND C. SWANSON, PAY 'N SAVE CORPORATION, THE TRUMP GROUP, LTD., NLAC CORP., ACQUICORP, INC., MERGICORP, INC., TGAC CORP., and TG LIMITED,

Defendants.

84 Civ. 7913 (GLG)

OPINION

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This putative class action[1] arises from a leveraged buy-out of Pay 'n Save Corporation (the "Company"). The plaintiff here alleges that in connection with this transaction, the defendants violated various federal securities laws, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § § 1961 to 1968 (1982 & Supp. III 1985), and the commonn and statutory law of the State of Washington. All of the defendants except the Company have moved to dismiss the amended complaint, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1). Defendants Crane, Hutchinson, Smith, and Swanson have moved to dismiss pursuant to these Rules as well as Fed. R. Civ. P. 9(b).

BACKGROUND

The pertinent facts, as alleged by the plaintiff, are as follows. On or about January 27, 1984, the Company acquired Schuck's Auto Supply from the defendants Stroum and Sloan in exchange for approximately 18.4 percent of the outstanding shares of the Company, worth approximately $70 million.

Thereafter, differences arose between these defendants and the board of directors of the Company, concerning the management of the Company. On March 30 1984, an agreement was reached between the Company and Stroum and Sloan (the "Standstill Agreement"). Pursuant to this agreement, Stroum and Sloan were made Company directors, and in return agreed, *inter alia*, that for one year they would not sell or otherwise dispose of their shares, or offer to acquire the Company, except as provided in the agreement. At the same time, however, the defendant directors Bean, Erickson and Hendricks acted to render Stroum's and Sloan's directorships powerless.

During the Spring of 1984, the Company, without the knowledge of Stroum of Sloan, sought a friendly suitor with

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[1] By order dated January 13, 1987, the plaintiff's motion for class certification was deemed withdrawn, subject to being renoticed when it might appear that the motion could be properly heard.

whom to negotiate the possible sale or merger of the Company.[2] On or near August 31, 1984, the "Trump defendants"[3] proposed a $22 per share tender-merger-leveraged buy-out with defendants Bean, Erickson and Hendricks, as well as nine other senior officers of the Company. Trading in the Company's shares was thereupon stopped, at which time Sloan and Stroum first learned of the Trump proposal.

Negotiations between the Trumps and the Company were made difficult by the stance of Sloan and Stroum, with whom the Trumps were unable to reach an agreement. Although Sloan and Stroum were willing to support the Trumps if the proposed price per share were increased by several dollars, the offered price was raised only to $22.50 per share. Over the dissent of Stroum and Sloan, the Board approved the proposal at this price, and a merger agreement and option agreement for 4,100,000 shares were executed. On the morning of September 7, 1984, the Company issued a press release announcing the Board's actions and that a tender offer at $22.50 per share was expected to begin in the next few days.[4]

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[2] The plaintiff complains of the fact that the Company did not approach Stroum or Sloan as potential acquirers, notwithstanding the fact that the Standstill Agreement was still in effect and notwithstanding that such a course of action would have been incongruous with management's alleged "obsession" with eliminating Stroum and Sloan.

[3] The Trump defendants ("Trumps") include defendants Julius and Eddie Trump, and the following defendant companies which are alleged to be owned and controlled by them and through which the merger agreements were executed: NLAC Corp., Mergicorp, Inc., Acquicorp, Inc. and TG Limited. *See* Amended Complaint at 8, ¶9.

[4] The amended complaint alleges that Merrill Lynch, the Company's financial advisor, had concluded that an appropriate price per share would be in the "high $20's," and that "a price in the $30's could be justified." The plaintiff also alleges that the defendants Bean, Hendricks and Erickson had discussed with Merrill Lynch a leveraged buy-out for $25 per share, "which they believed to be at the low end of value but feared that, at $25, they would tip off the true value of [the Company]." Finally, the plaintiff alleges that in a press release issued on September 7, 1984, Stroum and Sloan described $22.50 per share as "skimpy."

Thereafter, negotiations continued between the Trumps and Stroum and Sloan. On Septebmer 12, 1984, the Trumps informed the Company that to facilitate the negotiations with Stroum and Sloan, they were going to withdraw their previously announced tender offer. Later that day, the Trumps issued a press release announcing both the withdrawal, and the continuing negotiations with Stroum and Sloan.

On the same day, the Trumps, and Stroum and Sloan, entered into an agreement (the "Settlement Agreement"), pursuant to which the Trumps agreed to amend the merger agreement to provide for an increased tender price of $23.50 per share, and Stroum and Sloan agreed to grant the Trumps an option to purchase their shares. The agreement further provided that the Trumps would pay Stroum and Sloan $3.3 million for the option, and $900,000 for fees and expenses.[5]

The following day the Board approved the amendment to the merger agreement, and the Company and the Trumps promptly announced that fact and that a new tender offer would commence by September 19, 1984.

DISCUSSION

I. Count I

Based on these allegations, the plaintiff claims, in Count I, that the $4.2 million received by Stroum and Sloan, denominated as the option price plus expenses, in fact constituted a $1.50 per share premium above the price received by other shareholders,

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[5] Although the parties concur that under the Settlement Agreement the total amount which Stroum and Sloan received was approximately $70 million, they disagree over how to properly characterize this amount. The defendants maintain that the $70 million represents $23.50 per share plus $4.2 million for the option and expenses. The plaintiff, however, insists that the $70 million should be viewed in terms of the number of shares held by Stroum and Sloan, *i.e.*, $25 per share. From yet another perspective, the $70 million represents the value of the stock that Stroum and Sloan originally received from Pay n' Save in exchange for Schuck's Auto Supply, *i.e.*, Stroum and Sloan changed their original stock-for-stock deal to a cash-for-stock deal (but at no greater profit).

in violation of Section 14(d)(7), 15 U.S.C. § 78n(d)(7) (1982) and Rule 10b-13, 17 C.F.R. § 240.10b-13 (1986). Consequently, the amended complaint seeks the same premium for the approximately 6,000 class members who tendered a total of 11,866,834 shares, or a total of $17,800,251.

a. Section 14(d)(7)

Section 14(d)(7) provides that any person who varies the terms of a tender offer before its expiration, by increasing the consideration offered to security holders, shall pay such increased consideration to each security holder whose securities are taken up pursuant to the tender offer, whether or not such securities have been taken up before the variation.

Defendants argue that there was no tender offer in effect at the time of the Settlement Agreement pursuant to which Stroum and Sloan received the $4.2 million in question, and therefore no violation of Section 14(d)(7). Defendants' reasoning is as follows. Under Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1986), the public announcement of certain material terms of a cash tender offer may be deemed to commence a tender offer. However, a tender offer will not be deemed to have commenced on the date of the announcement of the offer if, within five business days thereof, the offeror issues another public announcement stating that it is discontinuing the offer. *Id.* Therefore, because the offer announced on September 7, 1984 was withdrawn within five business days by public announcement on September 12, there was no tender offer in place at the time of the Settlement Agreement, and thus, as a matter of law, no violation of either Section 14(d)(7) or Rule 10b-13.

The plaintiff responds by arguing that the withdrawal was a "sham," concocted to skirt the strictures of the Williams Act and allow Stroum and Sloan to secure a higher price than other shareholders. In keeping with the invective tenor of his complaint, the plaintiff uses the word "sham" somewhat indiscriminately. Although he derides the parties' motives, he does not explain on what basis we may properly characterize the withdrawal as a "sham" for purposes of Section 14 or Rule 10b-13, and we see none.

First, the plaintiff does not allege that anything in the first announcement on September 7 in any way prohibited the termination of the announced offer, nor that the Trumps were otherwise restricted from withdrawing their offer.[6] This lack attenuates the plaintiff's claim that the withdrawal was a sham. *See Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893 (D.Del. 1984). In *Brill, supra*, the plaintiff based her allegations of Section 14 violations on a similar argument that the "new" tender offer was merely a "guise." However, because the original offer was terminable, the *Brill* court found that there were two separate offers, notwithstanding that, *inter alia*, the second offer was made the day after the first was withdrawn, the price of the two offers was the same, and the new offer was made before the tendering shareholders had received back their tendered shares. *Brill, supra*, 590 F. Supp. at 898-99.

Moreover, there is no legal justification for labelling the withdrawal a "sham" merely because the Settlement Agreement was reached shortly after the withdrawal. "[N]either the [Williams] Act nor any SEC rule promulgated thereunder prohibits a former tender offeror from purchasing stock of a target through privately negotiated transactions immediately after a tender offer has been terminated." *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir. 1985).

b. Rule 10b-13

Rule 10b-13 provides that except in certain circumstances not applicable here,

> [n]o person who makes a cash tender offer . . . for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security . . . otherwise than pursuant to such tender offer

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[6] The plaintiff does argue that because the announcement did not terminate the merger agreement, and because the merger agreement contained an "offer provision," the announcement did not effect a withdrawal of the offer. This reasoning is fallacious. Although the merger agreement obligated NLAC (a Trump company) to *commence* an offer, the viability of that obligation has no bearing on whether there was in fact an offer in effect.

> . . . from the time such tender offer . . . is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period . . . during which securities tendered pursuant to such tender offer may by the terms of such offer be accepted or rejected . . . .

17 C.F.R. § 240.10b-13 (1986).

The defendants argue that there is no violation of Rule 10b-13, for several reasons. First, they apply the same analysis by which they argued that there was no Section 14(d)(7) violation, *i.e.*, because they withdrew the offer by public announcement within the statutory period, no tender offer was in effect at the time of the Settlement Agreement. Although this argument has some appeal, Exchange Act Release No. 16384 casts doubt on its viability. In that Release, the Securities Exchange Commission stated that the Rule 14d-2 provision, which provided that the second public announcement would prevent the first announcement from being deemed the commencement of a tender offer, applies only to Section 14(d), and not to Rule 10b-13. Exchange Act Release No. 16384, Fed. Sec. L. Rep. (CCH) ¶82,373 at p. 82,583 n.12 (Nov. 29, 1979). In other words, although pursuant to Rule 14d-2 a second announcement may withdraw the tender offer, *nunc pro tunc*, for purposes of Section 14(d), it will not do so for purposes of Rule 10b-13.

The defendants' second argument is that the primary purpose underlying Rule 10b-13 is not implicated in this case.

The object of Rule 10b-13 is two-fold. First, it safeguards the interests of security holders who have already tendered their securities and are unable to withdraw them in order to obtain the advantage of possible resulting higher market prices. Second, it protects the tender bidder by removing the incentive of holders of substantial blocks of securities to demand higher consideration than that currently offered to public investors. *See* statement of Orval L. DuBois, Secretary, Securities and Exchange Commission, Exchange Act Release No. 8712, 34 Fed. Reg. 15838, 15838-15839 (Oct. 15, 1969).

Neither of these purposes is implicated here. As to the first, the plaintiff does not allege that any tendering shareholder was prevented from withdrawing his shares to take advantage of possible higher market prices. Indeed, if any tender offer was in effect at the time of the Settlement Agreement, it was the $22.50 offer, and according to the amended complaint, no tender was honored at that price.[7] Nor does the plaintiff allege that there were market prices to be taken advantage of which were higher than either tender.

As to the second purpose, the plaintiff is an improper party to invoke Rule 10b-13 for that reason. If the tender bidder was injured by the incentive of substantial shareholders to demand higher consideration for their shares, it is for that bidder, here the Trumps, to complain, and not a shareholder.[8]

Moreover, the relief sought by the plaintiff, namely, the payment of the alleged premium to all the other shareholders, is inconsistent with underlying purposes of Rule 10b-13. First, nothing in either the Rule or Exchange Act Release No. 8712, *supra*, indicates that the Rule was intended to obtain for tendering shareholders the premium procured by substantial shareholders, but only to assure tendering shareholders access to possible higher market prices.

Second, the requested relief would not protect the tender bidder from the advantage held by substantial shareholders, but would conversely extend such advantage to all the shareholders. Therefore such relief would not serve the underlying purpose of the Rule, but rather exacerbate a problem it was intended to relieve.[9]

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[7] The defendants argue that in fact no shareholder tendered under the $22.50 offer, nor could one have, because the press release which allegedly commenced the offer did not provide instructions on how or where to do so.

[8] Nor does the possibility that the Company may have been injured make the plaintiff a proper party to allege a Rule 10b-13 violation. The plaintiff has specifically eschewed bringing a shareholder's derivative action. *See infra* p. 13.

[9] Finally, the defendants argue that the payment of the $4.2 million did not violate federal securities laws because those laws do not prohibit the payment

(Footnote continued.)

II. Count II

In Count II, the plaintiff alleges violations of Sections 10(b), 14(a), and 14(e), respectively 15 U.S.C. §§78j(b) (1982), 78n(a) (1982), and 78n(e) (1982). The plaintiff also alleges violations of Rules 10b-5 and 14a-9, respectively 17 C.F.R. §§240.10b-5 (1986) and 240.14a-9 (1986).

The plaintiff bases these claims on allegations that in various documents and press releases, the defendants failed to disclose, *inter alia*: (a) the directors' failure to take certain steps which might have maximized value for the shareholders; and (b) the directors' objective to eliminate Stroum and Sloan, the steps taken to implement this objective, and the fact that they pursued it without regard to either cost or its effect on the Company's business. Count II also recites various failures of the board which allegedly resulted in the Company's unadvisedly entering into the Merger Agreement, and in the shareholders' receiving less for their shares than they might have.[10]

The thrust of Count II is thus a claim for breach of fiduciary duty and a claim for failure to disclose such breach, neither of which states a claim under Section 10(b), Section 14(a), or Section 14(e). *See Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 4 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984)

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of a premium. The several cases cited in support of this proposition are inapposite insofar as they do not address the issue of the payment of a premium during the pendency of an alleged tender offer.

[10] Although the terms of the Settlement Agreement, and the monies received thereunder by Stroum and Sloan, were disclosed, the plaintiff also complains in Count II that it was not "disclosed" that if the $70 million which Stroum and Sloan received under the Settlement Agreement were divided by the number of their shares, one reached a figure of $25 per share. See footnote 4, *supra*. This claim is frivolous. As the plaintiff admits, it didn't take him long to make a similar computation himself. Plaintiff's Affidavit in Support of Class Certification at 2. In order to sufficiently disclose material facts, it is not required that stockholders be addressed "as if they were children in kindergarten." *Koppel v. Wien*, 575 F. Supp. 960, 969 (S.D.N.Y. 1983), *rev'd in part on other grounds*, 743 F.2d 129 (2d Cir. 1984) (citation omitted).

(Sections 10(b) and 14(e)); *Maldonado v. Flynn*, 597 F.2d 789, 796 (2d Cir. 1979) (Section 14(a)); *Penter v. Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (plaintiff cannot bootstrap a fiduciary duty claim into a federal securities action by alleging nondisclosure of the culpability of defendants' acts or motives).

III. RICO

In Count III, the plaintiff alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 to 1968 (1982 & Supp. III 1985).

Section 1962, the heart of RICO, is properly invoked only when the prohibitions contained therein[11] are violated through a "pattern of racketeering activity." We need not reach the issue of whether the plaintiff has sufficiently pled the predicate acts of racketeering, because we find that he has not sufficiently alleged a "pattern" of any such racketeering activity.

The plaintiff alleges that the preparation and dissemination of allegedly fraudulent documents, including the offer to purchase, the 1984 proxy statement, and the press releases, as well as the other allegedly wrongful acts complained of, constitute a pattern of racketeering activity. We disagree. These multiple acts were simply a series of events necessary to achieve a single objective, namely to take the Company private. "[A] single scheme, though comprised of numerous predicate acts, will not suffice to establish a pattern for the purposes of RICO." *Richter v. Sudman*, 634 F. Supp. 234, 239 (S.D.N.Y. 1986) (Goettel, J.)

Moreover, the plaintiff has made no allegation that the alleged scheme is on-going or that it threatens to continue; apparently

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[11] Section 1962 prohibits four types of activities. Section 1962(a) prohibits the investment of income derived from a pattern of racketeering activity in any enterprise whose activities affect interstate commerce. Section 1962(b) forbids the use of racketeering tactics to acquire or maintain control in an enterprise. Activities which affect foreign or interstate commerce may not be used in a pattern of racketeering activity under Section 1962(c), and Section 1962(d) makes it unlawful to conspire to violate Section 1962(a), (b), or (c).

the alleged scheme ended when the transactions were completed and Pay 'n Save became a privately held company. For this reason also, the amended complaint fails to plead a "pattern" of racketeering activity. *Richter, supra*, 634 F. Supp. at 240. Because the plaintiffs have failed to plead a pattern of racketeering activity, their RICO claims must be dismissed.

IV. State Law Claims

Because we must dismiss the plaintiff's federal claims, we decline to exercise pendent jurisdiction over his state-law claims. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-27 (1966); *Mayer v. Oil Field System Corp.*, 803 F.2d 749, 756-57 (2d Cir. 1986).

CONCLUSION

Normally, the granting of a motion to dismiss a complaint is made subject to allowing the plaintiff to replead. Such a course is inappropriate here. First of all, these motions to dismiss are directed against an already amended complaint, which was filed after the plaintiff had the benefit of extended discovery and thus presumably had a full grasp of the pertinent facts.

Nor should we allow the plaintiff to replead in order that he might assert a derivative action on the corporation's behalf. The plaintiff has for some time been aware that a possible derivative action could be asserted, but has intentionally eschewed such an opportunity, preferring to reach for the much larger damages which the successful maintenance of this suit might have produced.

For these reasons, we grant the motion to dismiss, without leave to replead.

SO ORDERED.

Dated: White Plains, N.Y.
June 3, 1987

/s/Gerard L. Goettel
Gerard L. Goettel
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERTRAM FILED,	:	
	:	
Plaintiff,	:	
	:	
—against—	:	84 CIVIL 7913-GLG
	:	
JULIUS TRUMP, EDDIE TRUMP, STUART M. SLOAN, SAMUEL N. STROUM, M. LAMONT BEAN, FENWICK CRANE, E. RONALD ERICKSON, CALVIN HENDRICKS, ROBERT B. HUTCHINSON, EARL W. SMITH, RAYMOND C. SWANSON, PAY 'N SAVE CORPORATION, THE TRUMP GROUP, LTD., NLAC CORP. ACQUICORP, INC., MERGICORP, INC., TGAC CORP., and TG LIMITED,	:	JUDGMENT
	:	
Defendants,	:	

Defendant(s) having moved for an order pursuant to Rule 12(b)(6) and 12(b)(1) F.R.Civ.P., and the said motion having come before the Honorable Gerard L. Goettel, United States District Judge, and the Court thereafter on June 4th, 1987-, having handed down its opinion #87,0011-WP, granting the said motion, it is

ORDER, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed, without leave to replead.

Dated: June 9th, 1987
White Plains, N.Y.

/s/Raymond F. Burghardt
Clerk

EXHIBIT D

§78n. Proxies

(d)(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

EXHIBIT E

§240.14d-2 Date of commencement of a tender offer

(a) *Commencement.* A tender offer shall commence for the purposes of section 14(d) of the Act and the rules promulgated thereunder at 12:01 a.m. on the date when the first of the following events occurs:

(1) The long form publication of the tender offer is first published by the bidder pursuant to Rule 14d-4 (a)(1) §240.14d-4(a)(1));

(2) The summary advertisement of the tender offer is first published by the bidder pursuant to Rule 14d-4 (a)(2) (§ 240.14d-4(a)(2));

(3) The summary advertisement or the long form publication of the tender offer is first published by the bidder pursuant to Rule 14d-4(a)(3) (§ 240.14d-(a)(3));

(4) Definitive copies of a tender offer, in which the consideration offered by the bidder consists of securities registered pursuant to the Securities Act of 1933, are first published or sent or given by the bidder to security holders; or

(5) The tender offer is first published or sent or given to security holders by the bidder by any means not otherwise referred to in paragraphs (a)(1) through (4) of this section.

(b) *Public announcement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section with respect to a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section *Except,* That such tender offer shall not be deemed to be first published or sent or given to security holders by the bidder under paragraph (a)(5) of this section on the date of such public announcement if within five business days of such public announcement, the bidder either:

(1) Makes a subsequent public announcement stating that the bidder has determined not to continue with such tender offer, in which event paragraph (a)(5) of this section shall not apply to the initial public announcement; or

(2) Complies with Rule 14d-3(a) (§ 240.14d-3(a)) and contemporaneously disseminates the disclosure required by Rule 14d-6 (§ 240.14d-6) to security holders pursuant to Rule 14d-4 (§ 240.14d-4) or otherwise in which event:

(i) The date of commencement of such tender offer under paragraph (a) of this section will be determined by the date the information required by Rule 14d-6 is first published or sent or given to security holders pursuant to Rule 14d-4 or otherwise; and

(ii) Notwithstanding paragraph (b)(2)(i) of this section, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

(c) *Information.* The information referred to in paragraph (b) of this section is as follows:

(1) The identity of the bidder;

(2) The identity of the subject company; and

(3) The amount and class of securities being sought and the price or range of prices being offered therefor.

(d) *Announcements not resulting in commencement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which only discloses the information in paragraphs (d)(1) through (3) of this section concerning a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall not be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section.

(1) The identity of the bidder;

(2) The identity of the subject company; and

(3) A statement that the bidder intends to make a tender offer in the future for a class of equity securities of the subject company which statement does not specify the amount of securities of such class to be sought or the consideration to be offered therefor.

(e) *Announcement made pursuant to Rule 135.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which discloses only the information in Rule 135(a)(4) (§ 230.135(a)(4)) concerning a tender offer in which the consideration consists solely or in part of securities to be registered under the Securities Act of 1933 shall not be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section: *Provided,* That such bidder files a registration statement with respect to such securities promptly after such public announcement.

FILED
JAN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JULIUS TRUMP, *et al.*,

Petitioners,

v.

BERTRAM FIELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM KLEIN II
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Of Counsel:

IRA A. FINKELSTEIN
VINCENT G. HUGHES

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QUESTIONS PRESENTED

1. *Where,* before trial, the District Court dismissed Plaintiffs' amended class action complaint, under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and

Where, the Second Circuit, accepting the allegations of the complaint as true, reversed on the law as to Plaintiff's Count I, Williams Act, § 14(d)(7) "best-price rule" claim, and remanded the case for trial:*

> *Question:* Should the Supreme Court, in the absence of a final decree, depart from its long standing tradition of denying petitions for certiorari to review interlocutory judgments of the Circuit Court of Appeals?

2. *Where,* the amended class action complaint alleges that a tender offeror signed a Merger Agreement with the target company, providing for a $22.50 per share tender offer, which was opposed by two dissident director shareholders, and

Where, the tender offeror issued a press release announcing the public tender offer, to be followed by the merger, and

Where, it is alleged that after 5:10 p.m. on the fourth business day thereafter: (a) the target's directors were advised that "in order to facilitate negotiations" with the two dissidents, the tender offeror was "withdrawing" the tender, but that the Merger Agreement remained in full force and effect, and (b) the tender offeror then issued a press release announcing the withdrawal "to facilitate the negotiations" and the negotiations with the dissidents, and

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* And the pendent state claims (A-4).

Where, it is alleged that late that same evening, the tender offeror simultaneously announced, by press release, a continuation of a "new" $23.50 per share tender-merger price, and a settlement with the dissidents which gave them—in addition to $23.50 per share—an option payment and fees and expenses amounting to a premium of $1.50 per share, or an aggregate of $25 per share; and

Where, it is alleged that the next morning the press releases announcing the "withdrawal" of the tender offer and the "new" $23.50 tender offer reached the public simultaneously:

Question: (a) Under SEC Rule 14d-2(b), in light of all of the circumstances, including that the Merger Agreement was still in effect, did the tender offeror's use of the label "withdrawal," effectively end the tender offer for purposes of the "best-price rule"?

The Second Circuit said No.

Question: (b) Is the applicability of the "best-price rule," solely determined by the tender offerors' use of the label "withdrawal" and "new" offer?

The Second Circuit said No.

Question: (c) Under the "best-price rule," is the mere announcement of a "withdrawal," inconsistent with deeming the tender offer not to have commenced, pursuant to Rule 14d-2(b), where the Merger Agreement providing for the tender is still in effect, the stated purpose of the "withdrawal" is to negotiate a private purchase, the private purchase is made within a few hours, and the press release announcing the "withdrawal" and the "new" price, reach the public simultaneously?

The Second Circuit said Yes.

Question: (d) Under the "best-price rule," was the increased price, with the Merger Agreement still in effect, part of a single plan of acquisition which may be treated as a single tender offer for purposes of the Rule?

The Second Circuit said Yes.

Question: (e) May a purported "withdrawal" of a tender offer, constitute a continuation of the offer, in light of the surrounding cicumstances?

The Second Circuit said Yes.

LIST OF PARTIES

The parties before this Court are identical to the parties to the proceedings below, who were the Respondent, Bertram Field, and the Petitioners, Julius Trump, Eddie Trump, Stuart M. Sloan, Samuel N. Stroum, M. Lamont Bean, Fenwick Crane, E. Ronald Erickson, Calvin Hendricks, Robert B. Hutchinson, Earl W. Smith, Raymond C. Swanson, Pay'n Save Corporation, The Trump Group, Ltd., NLAC Corp., Aquicorp, Inc., Mergicorp, Inc., TGAC Corp., and TG Limited.

The action below was commenced as a class action. Plaintiff moved for class certification, but the District Court declared the motion moot, when it granted the motion to dismiss the amended class action complaint. The District Court has not yet entertained a motion to certify the Plaintiff Class.

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No. 88-880

IN THE

Supreme Court of the United States

October Term, 1988

JULIUS TRUMP, *et al.*,

Petitioners,

v.

BERTRAM FIELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Bertram Field—Plaintiff in the District Court—respectfully prays that the Court deny the petition for issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which reversed the judgment of the United States District Court for the Southern District of New York,[1] with respect to its dismissal of Count I of Respondent's amended class action complaint, for failure to state a claim under the "best-price rule"—Section 14(d)(7) of the Securities Exchange Act of 1934 (the "Williams Act").

[1] The opinion of the District Court is reported at 661 F. Supp. 529 (S.D.N.Y. 1987).

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit—reported as *Field* v. *Trump*, 850 F.2d 938 (2d Cir. 1988) ("Second Circuit Opinion")—is set forth as Appendix A.

JURISDICTION

Petitioners' seek to invoke the Supreme Court's jurisdiction, pursuant to 28 U.S.C. § 1254(1)(1982). However, since the order appealed from is interlocutory, based on the allegations of the amended class action complaint, Respondent urges the Court, for the reasons hereafter stated, to decline to accept jurisdiction.

STATUTORY AND REGULATORY AUTHORITIES

A. The Williams Act "Best-Price Rule"

1. *Section 14(d)(7):* Plaintiff's principal class action claim arises under Section 14(d)(7) of the Williams Act, (the "best-price rule"), which states that:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.[2]

15 U.S.C. § 78n(d)(7) (footnote added).

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[2] The purpose of this provision is to prevent a tender offeror from discriminating in price among tendering shareholders, and the Securities and Exchange Commission ("SEC"), has stated that:

(footnote continued on following page)

2. *Rule 14d-10:* To codify the "all-holders requirement" and "best-price rule," the SEC has adopted Rule 14d-10, 17 C.F.R. § 240.14d-10 (1988), which provides in pertinent part:

> (a) No bidder shall make a tender offer unless:
>
> (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and
>
> (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

3. *Rule 10b-13:* SEC Rule 10b-13, 17 C.F.R. § 240.10b-13 (1988), which prohibits side transactions involving purchases of securities subject to a tender offer, provides, *inter alia:*

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the

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(footnote continued from preceding page)

> (i) a tender offer must be extended to all holders of the class of securities which is the subject of the offer (the 'all-holders requirement'); and (ii) all such holders must be paid the highest consideration offered under the tender offer (the 'best-price rule').

Proposed Amendments to Tender Offer Rules, Securities Exchange Act Release No. 6595 [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,797 (July 1, 1985).

> expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected.

B. Tender Commencement Rule [3]

Rule 14d-2(b) provides, *inter alia:*

> A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section [namely, the identity of the bidder and the target, the amount and class of the securities sought, and the price to be paid] with respect to a tender offer . . . shall be deemed to constitute the commencement of a tender offer [for the purposes of Section 14(d) and rules promulgated thereunder] *Except,* That such tender offer shall not be deemed to [have commenced under this section] on the date of such public announcement if within five business days of such public announcement, the bidder . . . [m]akes a subsequent public announcement stating that the bidder has determined not to continue with such tender offer. . . .

17 C.F.R. § 240.14d-2(b) (1988) (emphasis in original).

STATEMENT OF THE CASE

A. Introduction

The Second Circuit Opinion reasserts that Court's recognition, fifteen years ago, that the "best-price rule" cannot be avoided by simply allowing a tender offer to expire and then making a better one. *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 874-75 (2d Cir. 1974), cert.

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[3] Invoked by Petitioner in a spurius attempt to justify the label "withdrawal," no matter how objectively baseless.

denied, 419 U.S. 883 (1979). The more recent *Hanson Trust PLC* v. *SCM Corp.*, 774 F.2d 47, 58-59 (2d Cir. 1985), is to the same effect.

In *Cargill,* 498 F.2d at 874, Judge Friendly pointed out that, when the issue on the extent to which the "best-price rule" is decided, it would depend upon the circumstances. He predicted that where the first offer failed, followed by a new one, and the time gap was short—as it is here—a court would likely apply the "best-price rule." *Id.* at 875 n.48.

Those are exactly the circumstances upon which the amended class action complaint is based, and which *Cargill* anticipated 15 years ago. The Court of Appeals did not have to, and did not, look into Petitioners' minds in order to find the circumstances. Petitioners clearly stated what they would do, as the complaint alleges. And they did it. Their words said "withdraw," but their actions bespoke a steadfast determination to continue the tender offer. Their *words* said, and their *actions* confirmed, that they were negotiating a private purchase. Then they *actually* made it. Within only a few hours, and at the same time, they *acted to* and *did* continue the tender. The only change was a $1 price increase.

Under the Williams Act, that kind of conduct does not, as Petitioners assert, require the application of any new general principle, or the expansion of the scope of the "best-price rule." For whether the circumstances alleged in the complaint spell out a private purchase or a continuing tender, is not determined by the Petitioners' labels, "withdrawal" and "new" tender offer. (A-10). As Judge Winter said, speaking for the unanimous Second Circuit panel, if that were the law:

> giving effect to every purported withdrawal that allows a discriminatory premium to be paid to large shareholders would completely undermine the 'best-

> price rule' . . . The 'best-price rule' . . . is completely unenforceable if offerors may announce periodic, 'withdrawals' during which purchases at a premium are made and thereafter followed by 'new' tender offers. Unless excessive tender offers interrupted by withdrawals can in appropriate circumstances be viewed as a single tender offer for purposes of the Williams Act, the 'best price rule' is meaningless.

(A-10). The only thing extraordinary about this case is Petitioners' conduct. And the Williams Act required the Court of Appeals to give Petitioners what they deserve.

At this stage of the proceeding, the circumstances before the Second Circuit, and its decision, furnish no grounds for this Court to take jurisdiction.

B. Trumps' Single Tender Conduct

It is important to appreciate the full flavor of what has happened here, assuming, as must be done on a *motion to dismiss,* that Plaintiff's allegations are true. For the circumstances alleged in the complaint add up to an independently identifiable, single, continuous tender offer, which had its inception on August 31, 1984, and was announced on September 7, 1984. It achieved its goal on September 12, 1984, with a two-price tender-merger, $23.50 to the Class, and $25—the best-price—to two insiders, a $1.50 premium (the "Trumps' Single Tender Conduct"). The Merger Agreement, which provided for the tender, remained continuously in effect, despite the purported "withdrawal." We submit that these circumstances lead inescapably to the conclusion of the Second Circuit that, the purported "withdrawal" was not "genuine,"[4] and the Trpmps had not determined to discontinue their tender.

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[4] WEBSTER'S NEW 20TH CENTURY DICTIONARY (Collins World unabr. 2d ed. 1978), defines genuine "2. really being what it is said to be; actually coming from the alleged source of origin; real; true; authentic; not counterfeit or artificial."

The following are the principal allegations, objective, each and every one, which comprise the Trumps' Single Tender Conduct.[5] They are on the public record, and not secreted only in Petitioners' minds:

1. The dissenters, Stroum and Sloan (the "Stroums"), were Pay 'n Save directors and, with their families owned 18.4% of Pay 'n Save Common Stock (A-4).

2. Friction between the Stroums and management, led to management finding a purchaser for Pay 'n Save—the Trump Group (A-4).

3. On August 31, 1984, the Trumps proposed to the directors a $22 cash tender offer, to be followed by a merger (A-5).

4. A week later, the Trumps raised their offer to $22.50; a majority of the directors approved a Merger Agreement to that effect; but the Stroums dissented, calling the offer "skimpy" and arrived at in "unseemly haste" (A-5).

5. On September 7, 1984, the Trumps and Pay 'n Save executed a Merger Agreement, providing for the tender, and the Trumps issued a press release announcing a $22.50 tender-merger price (A-5).

6. Between September 7th and September 12th, one of the Trumps had several conversations with the Stroums trying to settle their objections (A-5).

7. On September 12, 1984: (a) after the close of the market, the Trumps arranged for a 5:10 p.m. (New York time), special telephone conference call with Pay 'n Save directors and (b) a Pay 'n Save lawyer advised the directors that *"in order to facilitate negotiations with Messrs. Stroum and Sloan"*:

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[5] As summarized by the Court of Appeals at A-4-6, unless specific complaint paragraphs are cited.

> "[I]t was necessary . . . to withdraw its tender offer of $22.50 per share, *pending resolution of the negotiations with Messrs. Stroum and Sloan.* HE MADE IT CLEAR TO THE DIRECTORS THAT THE MERGER AGREEMENT WAS STILL IN EFFECT."

(Complaint ¶ Forty-Second) (emphasis added).

8. On the evening of September 12, 1984, after the telephone directors meeting, the Trumps issued a press release announcing both the purported "withdrawal," and that its purpose was to negotiate with the Stroums (A-5).

9. Later that same night of September 12th, the Trumps and Stroums entered into a Settlement Agreement providing for: (a) increasing the tender offer to $23.50; and (b) paying the Stroums $4.2 million for an option to purchase their shares and for legal fees and expenses, which, when added to the $23.50 tender price, amounted to a $1.50 per share premium, for a total of $25 per share for the Stroums (A-5).

10. The next day, September 13th, a Pay 'n Save press release announced the new $23.50 tender price (A-6).

11. The press release announcing the purported "withdrawal" and the "new" price, reached the public simultaneously (A-6).

SUMMARY

As the Trumps' Single Tender Conduct demonstrates, the circumstances here are so studded with objective allegations, real and actual, that Petitioners' psychological, "subjective intent" accusations, are as contrived as they are illusory. For this case involves the circumstances and the kind of minute time gap anticipated by Judge Friendly in *Cargill,* 498 F.2d 851:

First: Rule 14d-2(b) provides that a tender offer shall not be deemed to have commenced where the bidder "has determined not to continue with such tender offer." Here, the complaint alleges that the Trumps never determined not to continue. On the contrary, they kept the Merger Agreement and public tender, alive and well. And, their first September 12th press release, made it clear that they were facilitating the negotiations for the private purchase of the Stroum shares, and not discontinuing the tender-merger. The Trumps never wavered in their goal: continuing the tender, until they achieved control of Pay 'n Save.[6]

Second: The press releases issued in the evening and night of September 12th, and the contemporaneous option and fee settlement, were timed so that the purported "withdrawal" would have no viable public impact. When word finally reached the public the next morning, the news of the $23.50 price had eclipsed the stale purported "withdrawal." Most of the country never heard about it until that morning.

Rule 14d-2(b), on which Petitioners rest their entire case, would have permitted the Trumps, after their September 7th $22.50 press release, to make a subsequent public announcement stating that they had "determined not to continue with such tender offer. . . ." Petitioners' problem is that the Trumps made *two subsequent public announcements simultaneously*—the $22.50 purported "withdrawal" together with the $23.50 "new" tender. Such twin announcements do not comply with Rule 14d-2(b). And under the "best-price rule," the Trumps' price increase, is a "continuation of the original offer, rather than as a new tender offer." (A-10).

---

[6] And they did it in a flash—5 days from the public announcement; 12 days after their first proposal.

Under Rule 14d-2(b), the Trumps' determination to continue the tender never paused. And under the "best-price rule," Trumps' increased price was a continuation of the original, and not a "new" tender.

Petitioners protest that the Trumps' labels should be credited, but their actions ignored. Under that self-serving scenario, all the Trumps had to do was *say* they were withdrawing their tender, even though they then *acted to* immediately reinstate it. The Trumps' artifice, contrives the illusion that by a single utterance of the word "withdrawal" —and nothing else—they complied with the Williams Act. But that veil is so flimsy, it cannot conceal the fact that the Merger Agreement was still in effect, the "new" offer followed almost immediately, and it reached the public in tandem with the purported "withdrawal." We submit that such a construct spells out "mirage," not Williams Act.

It is sophistry for Petitioners to claim that the Second Circuit's finding that the original tender offer-merger *had not been withdrawn,* depended upon Trump's "subjective intent." (Cert. Pet. 12). On the contrary, all of the actions, discussions, and meetings between the parties, demonstrated that the Trumps considered the original tender offer-merger *as the basis for all of their negotiations.* Price was the only item on the table.

The whole point of the few hours of continuing negotiations, and the only reason for the "withdrawal" label, was to save the Trumps $18 million. They paid the Class only $23.50 per share, and gave the best-price to the dissident Stroums alone, a $1.50 premium—$25 per share. The only thing new was the $1 price increase. Therefore, as the Second Circuit said, under the "best-price rule," such a price increase "is a continuation of the original offer, rather than a new tender offer." (A-10).

The final indignity to the public shareholders, for whose protection the "best-price rule" is designed, is this: The after market closing notice of the purported "withdrawal," was overtaken the following morning by the increased price news. The public never heard of the purported "withdrawal," before the price increase.

There is absolutely nothing subjective about that.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE THE PETITION IS PREMATURE; THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ITS FIFTEEN YEAR OLD VIEW OF THE "BEST-PRICE RULE"; AND THERE IS NO EXTRAORDINARY BASIS FOR REVIEW BEFORE THE FINAL DECREE

The Supreme Court custom not to issue a writ of certiorari to review a Court of Appeals decree on appeal from an interlocutory order by invoking the Court's jurisdiction, pursuant to 28 U.S.C. § 1254(1) (1982), is of long standing. Nevertheless, Petitioners seek such extraordinary relief. In *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372 (1893), this Court long ago established that:

> Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this Court should not issue a writ of

> certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Id. at 384.

The opinion below is not final. That is a fact which "of itself alone" may furnish "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The Supreme Court traditionally exercises its discretion to grant a petition for a writ of certiorari sparingly. *Id.* ("except in extraordinary cases the petition is not issued until final decree"); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (Supreme Court denied union's petition for writ of certiorari "because the Court of Appeals remanded the case, [and therefore] it is not yet ripe for review by this Court"). Yet Petitioners never mention, much less address, the interlocutory nature of the Second Circuit's opinion.

Accepting the allegations of the complaint as true, the Court of Appeals noted that "[i]f the allegations are proven, a $1.50 premium to the Stroums would violate Section 14(d)(7)." (A-12). Thus, plaintiff still must prove his allegations at trial. On that basis alone, the Supreme Court's denial of the petition, at this stage of the proceedings, would not prejudice Petitioners' right, on final judgment, to raise the same issues. *See Urie* v. *Thompson*, 337 U.S. 163, 172-73 (1949); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 672 n.19 (1979), *modified*, 444 U.S. 816 (1979). And denying the petition, will not "establish the law of the case or amount to *res judicata* on the points raised." *Hughes Tool Co.* v. *Trans World Airlines, Inc.*,

409 U.S. 363, 365 n.1 (1973), *reh'g denied*, 410 U.S. 975 (1973) (citing *Indianapolis* v. *Chase Nat'l Bank*, 314 U.S. 63 (1941)).

We submit that Petitioners offer no compelling reason sufficient to persuade this Court to depart from its normal practice of denying interlocutory review. The only extraordinary aspects of this case are Petitioners' attempts to circumvent and eviscerate the "best-price rule"; their belated discovery of "subjective intent"; and their making this petition, in disregard, or ignorance of *Cargill*.

As previously noted, the Court of Appeals opinion follows the path predicted by *Cargill*. After all these years, there is nothing new or extraordinary about the law applicable to this case,[7] no uncertainty, and no conflict with any other decision anywhere. No court has ever held that an offeror can fabricate a "withdrawal." If it isn't real and true—100% and not 50%—then, under Rule 14d-2(b), the tender continues and the purported "withdrawal" has no effect. Therefore, the "best-price rule" applies, as Congress intended.

[7] The cases cited by Petitioners are inapposite, for none were confronted with the unusual collection of circumstances which make up the fabric of the amended class action complaint. The only authority which does anticipate them, was never cited by Petitioners: *Cargill*, 498 F.2d 851.

II.

THE COURT OF APPEALS' UNANIMOUS "BEST-PRICE" DECISION, IS CONSISTENT WITH THE FACTS ALLEGED, AND WITH THE LAW, AND DOES NOT REQUIRE EXTRAORDINARY REVIEW

A. Labels Do Not A Withdrawal Make

The heart of the decision below, which Petitioners find so repugnant and unusual, is that "[w]hether the purchase of the Stroums' shares was a private purchase or part of a continuing tender offer is not determined simply by the Trumps' use of the labels 'withdrawal' and 'new' offer. (A-10) (citing *McDermott, Inc.* v. *Wheelabrator-Frye, Inc.*, 649 F.2d 489 (7th Cir. 1980) (announcement of increase in number of shares sought not new tender.)

This is how Judge Winter, for the unanimous Second Circuit panel, explained the Court's reasoning:

> Whether the acquisition of shares in a corporation is part of a tender offer for purposes of the Act cannot be determined by rubber-stamping the label used by the acquiror. *Wellman* v. *Dickinson*, 475 F. Supp. 783, 823-25 (S.D.N.Y. 1979) (so-called 'privately negotiated' purchases of shares constitute tender offer for purposes of Williams Act); *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). Were the label used by the acquiror determinative, virtually all of the provisions of the Williams Act, including the filing and disclosure requirements could be evaded simply by an offeror's announcement that offers to purchase of stock were private purchases. *Id.*

(A-10-11).

On the allegations before it—the Trumps' Single Tender Conduct—the Second Circuit's conclusion was inescapable:

> Similarly, giving effect to every purported withdrawal that allows a discriminatory premium to be paid to large shareholders would completely undermine the 'best-price rule.' For example, plaintiff has alleged that the purported withdrawal of the original tender offer was intended solely to allow the Trumps to pay a premium of $1.50 per share of the Stroums that was not offered to shareholders who tendered pursuant to the 'new' tender offer announced immediately thereafter. The 'best-price rule' of Section 14(d)(7) and Rule 14d-10 is completely unenforceable if offerors may announce periodic 'withdrawals' during which purchases at a premium are made and thereafter followed by 'new' tender offers. *Unless successive tender offers interrupted by withdrawals can in appropriate circumstances be viewed as a single tender offer for purposes of the Williams Act, the 'best-price rule' is meaningless.*

(A-10) (footnote omittted; emphasis added).

Judge Friendly reached the same conclusion in *Cargill*, 498 F.2d 851. There, Missouri Portland, the target of a tender offer by Cargill, wrote its shareholdders that if Cargill increased the tender price during the tender offer, shareholders who had already tendered, would not get the higher price. The District Court had found the letter misleading because, under Section 14(d)(7), the stockholders were entitled to such a higher "best price." But Missouri Portland responded by explaining that its letter referred to a higher price in a "new" offer.

On appeal, Judge Friendly said that "how far the strictures of § 14(d)(7) can be avoided by allowing an offer to expire and then making a better one is an issue as yet undecided." *Id.* 498 F.2d at 875. But in footnote 48, Judge Friendly pointed out that: "Probably much will depend

upon the circumstances. If the first offer was a failure and the time gap short, a court would be likely to hold that the statute applies; *per contra* if the time gap was substantial and there had been a general increase in stock prices." *Id.* at 875 n.48.

Moreover, the Second Circuit Opinion pointed out that in 1985, that Court had "explicitly recognized that purchases after a purported withdrawal of a tender offer may constitute a continuation of the offer in light of the surrounding circumstances." (A-10). (citing *Hanson Trust PLC* v. *SCM Corp.*, 774 F.2d 47 (2d Cir. 1985)).

Significantly, Judge Winter added that the "best-price rule" itself permits a price increase as part of the original offer: *"Finally, Section 14(d)(7) itself explicitly treats a material change in the terms of a tender offer in the form of an increased price as a continuation of the original offer rather than as a new tender offer. Clearly, therefore, purchases of shares by an offeror after a purported withdrawal of a tender offer may constitute a continuation of the original tender offer."* (A-10) (emphasis added).

Here, of course, the Merger Agreement stood solid. The only change was price. And that's exactly what, as a matter of law, makes the tender-merger one, solitary, single, continuous tender-merger. Under the "best-price rule," there was nothing new about it.

B. Under The "Best-Price Rule," The Withdrawal Must Be Genuine

Petitioners' mere calling the Trumps' continuing tender withdrawn, does not make it so. All of the allegations are to the contrary. The circumstances required little interpretation, because they were not hidden. They were there for all to see, and the Court of Appeals observed them clearly and correctly:

> For purposes of the 'best-price rule,' therefore, an announcement of a withdrawal is effective when the offeror *genuinely* intends to abandon the goal of the original offer. [*See Hanson Trust*, 774 F.2d at 58-59] (termination of tender offer effective in light of evidence that goal of obtaining control of target corporation was abandoned). The complaint here alleges that the Trumps' Offer to Purchase explicitly stated that the purported withdrawal was intended to allow negotiations with the Stroums. Such negotiations indicate a continuing intent to obtain control of Pay'n Save.
>
> Moreover, the complaint alleges conduct from which inferences might be drawn that the Trumps had not abandoned the goal of the original offer.

(A-11) (emphasis added).

C. Under Rule 14d-2(b), The Determination Not To Continue Must Be Genuine

Petitioners protest that Rule 14d-2(b) gives them the absolute, unqualified, unconditional right to claim that the tender-merger was discontinued, regardless of the Trumps' conduct. The Second Circuit correctly rejected such an inflexible disregard for what the securities laws are all about —the truth:

> That Rule merely creates a window of time during which a genuine withdrawal leaves matters for all legal purposes as though a tender offer had never been commenced. The Rule does nothing to alter the principle that the mere announcement of a withdrawal may not be effective if followed by purchases of shares and other conduct inconsistent with a genuine intent to withdraw. The Rule is also irrelevant because a bidder is always free to withdraw a tender offer. The argument advanced by defendants,

> if correct, would thus apply even in cases in which the provisions of Rule 14d-2(b) governing withdrawal announcements did not.

(A-11) (footnote omitted).

Petitioners' claim that under Rule 14d-2(b), by the Trumps' use of the label "withdrawal," their tender offer must be deemed never to have commenced. Do they seriously contend that the Congress gave the Trumps a blank check to use the word "withdrawal" to deny the existence of their tender, even if it wasn't true?

The Trumps' Single Tender Conduct, leaves no room, nor basis, for Petitioners' desperate attempt to convert the Second Circuit's opinion into an exercise of "subjective intent." Yet that charge is what the petition is all about. It is false, because it was what the Trumps are alleged to have actually said, and actually did, which was critical to the Court's determination that the Trumps had not abandoned the tender offer.

Furthermore, the Second Circuit properly pointed out that in order to ascertain whether an offeror had abandoned the goal of the original tender offer, courts may employ an objective test similar, if not identical, to that used to determine whether single or multiple offerings have been made for purpose of securities registration requirements. Such scrutiny could include the following factors: (1) whether the offers were made as part of a single plan of acquisition; (2) were the same class of security involved in the purchase; and (3) were the offers made at or about the same time. (A-12). Here the answer to each is, of course, affirmative.

The Trumps' Single Tender Conduct evidences that the Second Circuit did not apply a "subjective intent" test. It did not have to. For the Trumps' actions were uninterruptedly consistent with the continuation of the tender offer.

CONCLUSION

The petition is as premature, as it is bereft of any grounds for the extraordinary relief it seeks. For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 419 August Term, 1987

(Argued January 6, 1988) Decided

Docket No. 87-7578

BERTRAM FIELD,
Plaintiff-Appellant,

v.

JULIUS TRUMP, EDDIE TRUMP, STUART M. SLOAN, SAMUEL N. STROUM, M. LAMONT BEAN, FENWICK CRANE, E. RONALD ERICKSON, CALVIN HENDRICKS, ROBERT B. HUTCHINSON, EARL W. SMITH, RAYMOND C. SWANSON, PAY'N SAVE CORPORATION, THE TRUMP GROUP, LTD., NLAC CORP., ACQUICORP, INC., MERGICORP, INC., TGAC CORP. and TG LIMITED,
Defendants-Appellees.

B e f o r e: VAN GRAAFEILAND, WINTER and ALTIMARI, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*) dismissing, under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), plaintiff's amended class-action complaint. The district court dismissed plaintiff's claim brought under Section 14(d)(7) of the Securities Exchange Act of 1934 holidng that a purported withdrawal of a tender offer was effective even though the withdrawal was followed within

a few hours by acquisition of an option to purchase a large block of the stock subject to the tender offer, and therafter by an announcement of a purportedly new tender offer. The district court also held that plaintiff had failed to state claims under RICO or under Sections 10(b), 14(a) and 14(e) of the '34 Act, and Rules 10b-5, 10b-13 and 14a-9 thereunder. We reverse the dismissal of plaintiff's claim under Section 14(d)(7) but affirm the dismissal of the remanining federal claims.

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WINTER, *Circuit Judge*:

The legal issues in this appeal concern the meaning of the so-called "best-price rule" of Section 14(d)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(7) (1982), and the disclosure obligations of a publicly held company under that Act.

Accepting the allegations of the complaint as true, this dispute arises from a leveraged buy-out in which defendants Julius and Eddie Trump, through corporations they owned and controlled, commenced a tender offer at a price of $22.50 per share for shares of defendant Pay'n Save Corporation, a Washington state corporation. Shortly after the market closed on the fourth business day after the announcement of the tender offer, the Trumps "withdrew" the offer in order to arrange a purchase of a bloc of shares from certain dissident directors. Later that night, after acquiring an option to purchase the dissidents' shares, the Trumps announced a "new" tender offer at $23.50 per share. When the price of the option and a side payment for "fees and expenses" is taken into account, the dissidents received $25.00 per share, a $1.50 premium over the price paid to the tendering shareholders.

Bertram Field subsequently brought this class action in the Southern District against the Trumps, their firms, Pay'n Save and its officers and directors. The amended complaint alleged that the agreement between the Trumps and the dissident directors violated Section 14(d)(7), commonly known as the "best-price" provision of the Williams Act, and SEC Rule 10b-13. 17 C.F.R. § 240.10b-13 (1987). In addition, the complaint alleged that various documents relating to the tender offer, and an earlier Pay'n Save proxy statement, contained material omissions, in violation of Sections 10(b), 14(a) and 14(e) of the '34 Act, 15 U.S.C. §§ 78j(b), 78n(a), (e) (1982), Rules 10b-5 and 14a-9 thereunder, 17 C.F.R. §§ 240.10b-5, 14a-9 (1987), and, of course, by extension, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), (d) (1982). Field alleged pendent state-law claims as well.

Judge Goettel dismissed the amended complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Field v. Trump*, 661 F. Supp. 529 (S.D.N.Y. 1987). The district court held that plaintiff did not state a claim under Section 14(d)(7) because the Trumps had announced an effective withdrawal of their tender offer before they struck their deal with the dissident directors, *id.* at 532, and that plaintiff was not a proper party to invoke Rule 10b-13. *Id.* at 533. The district court also dismissed the nondisclosure counts on the ground that they were attempts to bootstrap state-law fiduciary-duty claims into a federal securities-law action. Finally, Judge Goettel found that the complaint failed to allege a "pattern of racketeering activity" under RICO. We reverse the dismissal of the Section 14(d)(7) claim and the pendent state claims but otherwise affirm.

BACKGROUND

According to the amended complaint, the allegations of which we must accept as true, this dispute originates in Pay'n Save's acquisition of Schuck's Auto Supply, Inc. in January 1984. That transaction left the former owners of Schuck's, defendants Samuel N. Stroum and Stuart M. Sloan and members of their families ("Stroums" or "Stroum Group"), holding 18.4% of Pay'n Save's outstanding common stock. The Stroums were not happy shareholders, however, and had their own ideas about how to run Pay'n Save. Looking for ways to pacify the Stroums, Pay'n Save management sought and obtained a standstill agreement dated March 30, 1984. The Stroums agreed not to sell or otherwise dispose of their shares, or to offer to purchase Pay'n Save. In return, Stroum and Sloan received seats on the company's board.

Friction between the Stroums and management nevertheless continued. As a result, management retained Kidder Peabody and later Merrill Lynch Capital Markets to find a purchaser for the company. To the same end, defendant Calvin Hendricks, Pay'n Save's Chief Financial Officer and Vice-Chairman of its board, undertook discussions with Eddie Trump, President of the Trump Group, Ltd., about acquiring Pay'n Save. According to its subsequent Offer to Purchase, the Trump Group took the

position that it "would only consider an acquisition of the company if management would participate in the equity of the resulting entity." Offer to Purchase at 4. Management agreed, and on August 31 the Trumps proposed to the Pay'n Save board a cash tender offer at $22.00 per share for two-thirds of the company's outstanding shares, to be followed by a cash-out merger at the same price. One week later, in the early morning hours of a late-night Pay'n Save board meeting, the Trumps raised their offer to $22.50 but warned that it would be withdrawn if it were not approved. Merrill Lynch opined that $22.50 was a fair price, and a majority of Pay'n Save's board approved it. Stroum and Sloan dissented. That morning, September 7, 1984, Pay'n Save issued a press release announcing that it had reached a merger agreement with the Trumps and that the Trumps were initiating a tender offer at $22.50. In a statement of their own, the Stroums called the Trump offer "skimpy" and accused management of acting in "unseemly haste."

During the next few days, according to the Offer to Purchase, "Eddie Trump contacted Messrs. Stroum and Sloan and the parties had several conversations concerning the possibility of settling the objections of Messrs. Stroum and Sloan to the Transactions." Offer to Pruchase at 6. At 5:10 p.m. on September 12, after a meeting between the Trumps, Stroum and Sloan, the Trumps told Pay'n Save's board that they were withdrawing their previously announced tender offer in order "too facilitate the negotiations with Messrs. Stroum and Sloan." *Id.* The Trumps also issued a press release announcing both the withdrawal of their tender offer and their negotiations with the Stroums. These negotiations quickly bore fruit. Late that night, the Trumps and the Stroums entered into a Settlement Agreement under which the Trumps paid the Stroums $3,300,000 for an option to purchase the Stroums' shares at $23.50 per share. In addition, the Trumps paid the Stroums $900,000 for the Stroums' "fees and expenses." The Settlement Agreement was subject to the Pay'n Save board's approval of an amendment to the September 7 merger agreement that would provide for an increased price of $23.50 per share for the tender offer and merger. The $4,200,000 payment (option price plus "fees and expenses"), when added

to the $23.50 per share purchase price, amounted to a price of $25.00 per share for the Stroums.

The next day, September 13, the Pay'n Save board approved the amendment to the merger agreement, and Pay'n Save issued a press release announcing that the Trumps would soon proceed with a tender offer at the new $23.50 price. According to the complaint, the press release announcing the new price and the September 12 press release announcing the "withdrawal" reached the public simultaneously.

Claiming to have been a Pay'n Save shareholder who tendered shares of $23.50, a $1.50 less than the price paid to the Stroums, plaintiff brought this putative class action against Pay'n Save, its officers (M. Lamont Bean, Chairman of the Board and Chief Executive Officer; E. Ronald Erickson, President and Chief Operating Officer; and Calvin Hendricks, Vice Chairman of the Board and Chief Financial Officer), its pro-management directors (Fenwick Crane, Raymond C. Swanson, Robert B. Hutchinson and Earl W. Smith), the dissident directors (Stroum and Sloan), and the Trumps and their affiliated entities (Eddie Trump, Julius Trump, the Trump Group, Ltd., NLAC Corp., Acquicorp, Inc., Mergicorp, Inc., TGAC Corp. and TG Limited).

Count I of the complaint alleged that the $4,200,000 received by the Stroums constituted a premium of $1.50 per share above the price received by other shareholders, in violation of Section 14(d)(7) and Rule 10b-13. Count II alleged that the Trumps' Offer to Purchase and an earlier Pay'n Save proxy statement contained various omissions of material facts, in violation of Sections 10(b) and 14(e) of the '34 Act and Wash. Rev. Code § 21.20.010 (1978). Count III alleged that Pay'n Save's officers and directors had conducted, and had conspired to conduct, the affairs of Pay'n Save through a pattern of racketeering activity, in violation of RICO, 18 U.S.C. § 1962(c) and (d). Finally, Count IV alleged that, under the common law of the State of Washington, Pay'n Save's officers and directors had committed various breaches of their fiduciary duties of loyalty and care in connection with the sale of Pay'n Save.

DISCUSSION

1. *The Section 14(d)(7) Claim*

Plaintiff's principal claim arises under Section 14(d)(7) of the Williams Act, the so-called "best-price" provision, which states that:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

15 U.S.C. § 78n(d)(7). The purpose of this provision is to prevent a tender offeror from discriminating in price among tendering shareholders. The position taken by the SEC thus is that:

> (i) a tender offer must be extended to all holders of the class of securities which is the subject of the offer (the "all-holders requirement"); and (ii) all such holders must be paid the highest consideration offered under the tender offer (the "best-price rule").

Proposed Amendments to Tender Offer Rules, Securities Act Release No. 6595 [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶83,797 (July 1, 1985). To codify the "all-holders requirement" and "best-price rule," the SEC has adopted Rule 14d-10, 17 C.F.R. § 240.14d-10 (1987), which provides in pertinent part:

> (a) No bidder shall make a tender offer unless:
>
> (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and
>
> (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

To the same end, the SEC has promulgated a rule prohibiting side transactions involving purchases of securities subject to a tender offer. Rule 10b-13 thus provides in pertinent part:

> (a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected.

The essence of plaintiff's claim is that the $4,200,000 paid to the Stroums during the brief "withdrawal" of the offer was in law and fact a payment of a $1.50 per share premium intended to induce the Stroums to accept the tender offer. The failure to pay this premium to the other tendering shareholders, plaintiff argues, violated the "best-price rule."

No party disputes the proposition that payment of a premium to one shareholder and not others during a tender offer is illegal. The issue rather is whether the purported withdrawal effectively ended the offer so that the $4,200,000 payment was not during or part of a tender offer. In dismissing the Section 14(d)(7) claim, the district court relied upon SEC rules governing the commencement of a tender offer, specifically Rule 14d-2(b), which provides that:

> [a] public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section [namely, the identity of the bidder and the target, the amount and class of the securities sought, and the price to be paid] with respect to a

> tender offer . . . shall be deemed to constitute the commencement of a tender offer [for the purposes of Section 14(d) and rules promulgated thereunder] *Except*, That such tender offer shall not be deemed to [have commenced under this section] on the date of such public announcement *if within five business days of such public announcement, the bidder . . . [m]akes a subsequent public anouncement stating that the bidder has determined not to continue with such tender offer*. . . .

17 C.F.R. § 240.14d-2(b) (1987) (emphasis added). Thus, while the public announcement of the essential terms of a tender offer results in the technical "commencement" of a tender offer, the offer will nevertheless be legally deemed not to have commenced if its withdrawal is announced within five business days. In the instant case, the initial announcement of the Trumps' tender offer came on the morning of Friday, September 7, 1984, and the purported withdrawal was announced on the afternoon of Wednesday, September 12, four business days later. Based on these facts, the district court concluded that, for purposes of Section 14(d)(7), "there was no tender offer in place at the time of the Settlement Agreement, and thus, as a matter of law, no violation of [that] Section." 661 F. Supp. at 532. We disagree, however, and believe that the allegations of the complaint state a claim under the Williams Act.

The Williams Act does not define "tender offer." Courts faced with the question of whether purchases of a corporation's shares are privately negotiated or are part of a tender offer have applied a functional test that scrutinizes such purchases in the context of various salient characteristics of tender offers and the purposes of the Williams Act. *SEC v. Carter Hawley Hale Stores*, 760 F.2d 945, 950 (9th Cir. 1985); *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 56-57 (2d Cir. 1985) (eight factor "test"; balancing of factors in particular case determined in light of Act's policy to protect ill-informed solicitees). Whether the acquisition of shares in a corporation is part of a tender offer for purposes of the Act cannot be determined by rubber-stamping the label used by the acquiror. *Wellman v. Dickinson*, 475 F.

Supp. 783, 823-25 (S.D.N.Y. 1979) (so-called "privately negotiated" purchases of shares constitute tender offer for purposes of Williams Act); *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983). Were the label used by the acquiror determinative, virtually all of the provisions of the Williams Act, including the filing and disclosure requirements could be evaded simply by an offeror's announcement that offers to purchase of stock were private purchases. *Id.*

Similarly, giving effect to every purported withdrawal that allows a discriminatory premium to be paid to large shareholders would completely undermine the "best-price rule." For example, plaintiff has alleged that the purported withdrawal of the original tender offer was intended solely to allow the Trumps to pay a premium of $1.50 per share of the Stroums that was not offered to shareholders who tendered pursuant to the "new" tender offer announced immediately thereafter.[1] The "best-price rule" of Section 14(d)(7) and Rule 14d-10 is completely unenforceable if offerors may announce periodic "withdrawals" during which purchases at a premium are made and thereafter followed by "new" tender offers. Unless successive tender offers interrupted by withdrawals can in appropriate circumstances be viewed as a single tender offer for purposes of the Williams Act, the "best-price rule" is meaningless.

Whether the purchase of the Stroum shares was a private purchase or part of a continuing tender offer is not determined simply by the Trumps' use of the labels "withdrawal" and "new" offer. *Cf. McDermott, Inc. v. Wheelabrator-Frye, Inc.*, 649 F.2d 489 (7th Cir. 1980) (announcement of increase in number of shares sought not new tender offer). Indeed, we have explicitly recognized that purchases after a purported withdrawal of a tender offer may constitute a continuation of the offer in light of the surrounding circumstances. *Hanson Trust*, 774 F.2d at 58-59. Finally, Section 14(d)(7) itself explicitly treats a material change in the terms of a tender offer in the form of an increased price as a continuation of the original offer rather than as a new tender offer. Clearly, therefore, purchases of shares by an offeror after a purported withdrawal of a tender offer may constitute a continuation of the original tender offer.

Rule 14d-2(b) is not to the contrary. That Rule merely creates a window of time during which a genuine withdrawal leaves matters for all legal purposes as though a tender offer had never been commenced. The Rule does nothing to alter the principle that the mere announcement of a withdrawal may not be effective if followed by purchases of shares and other conduct inconsistent with a genuine intent to withdraw. The Rule is also irrelevant because a bidder is always free to withdraw a tender offer. The argument advanced by defendants, if correct, would thus apply even in cases in which the provisions of Rule 14d-2(b) governing withdrawal announcements did not.[2]

For purposes of the "best-price rule," therefore, an announcement of a withdrawal is effective when the offeror genuinely intends to abandon the goal of the original offer. *See id.* (termination of tender offer effective in light of evidence that goal of obtaining control of target corporation was abandoned). The complaint here alleges that the Trumps' Offer to Purchase explicitly stated that the purported withdrawal was intended to allow negotiations with the Stroums. Such negotiations indicate a continuing intent to obtain control of Pay'n Save.

Moreover, the complaint alleges conduct from which inferences might be drawn that the Trumps had not abandoned the goal of the original offer. In determining the most appropriate analysis for evaluating the conduct of an offeror surrounding a purported withdrawal, we draw upon a suggestion of Professor Loss. He has noted that the determination of whether formally separate offerings of securities should be "integrated," and thus considered a single offering, for the purposes of the various registration exemptions, is closely analogous to the question of whether single or multiple tender offers have been made. L. Loss, *Fundamentals of Securities Regulations* 577 n.33 (1983) (suggesting comparison of " 'integration' problem with respect to certain exemptions under the 1933 Act" with Section 202(166)(B) of the ALI's proposed Federal Securities Code, which "treats [tender] offers as separate if they are for different classes of securities or are 'substantially distinct on the basis of such factors as manner, time, purpose, price and kind of consideration' ").

In establishing criteria to govern the integration of formally separate offerings, the SEC has identified the following factors, *inter alia*, as relevant: "(1) are the offerings part of a single of financing; (2) do the offerings involve issuance of the same class of security; (3) are the offerings made at or about the same time . . . ?" Section 3(a)(11) Exemption for Local Offerings, Securities Act Release No. 4434 (Dec. 6, 1961). Analogous factors may thus point to "integration" in the context of formally separate tender offers: (1) are the offers part of a single plan of acquisition; (2) do the offers involve the purchase of the same class of security; and (3) are the offers made at or about the same time? These factors are useful in determining the ultimate fact of whether an offeror has abandoned the goal of an initial tender offer in announcing a withdrawal of that offer. As previously noted, where the goal has not been abandoned, a purported withdrawal followed by a "new" offer must be treated as a single continuing offer for purposes of the "best-price rule."

Accepting as true the facts alleged in plaintiff's complaint, all of the listed factors weigh in favor or treating the Trumps' acquisition of Pay'n Save shares as a single tender offer. If the allegations are proven, the alleged $1.50 premium to the Stroums would violate Section 14(d)(7).

The parties and the district court have correctly assumed that Section 14(d)(7) impliedly affords a private right of action to shareholders. In *Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.), *cert. denied*, 107 S. Ct. 445 (1986), we held that the best-price provision's statutory neighbor, Section 14(d)(6) of the '34 Act, 15 U.S.C. § 78n(d)(6) (1982), which requires pro rata acceptance of tendered shares in oversubscribed offers, could be privately enforced. Section 14(d)(7) certainly provides at least as strong a basis for the implication of a private remedy as does Section 14(d)(6). As in *Pryor*, the plaintiff here is "surely [one of] the primary intended beneficiaries of [the statute], since 'the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer.' " 794 F.2d at 57 (quoting *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 35 (1977)). Moreover, Section 14(d)(7), like Section 14(d)(6) and "unlike the bulk of

federal securities regulation, confers a substantive right on [its] beneficiaries," thereby "suggest[ing] that Congress intended to create a private right of action." *Id.* In addition, as is true of the proration provision, a private damage action provides a particularly effective means of enforcing the strictures of the "best-price rule." When a premium is paid to one shareholder in violation of Section 14(d)(7), "the injury is easy to calculate, the victims are easy to locate, and the likelihood of litigation by such victims is high if a private right of action exists." *Id.* at 58. Finally, a cause of action under Section 14(d)(7) is not one "traditionally relegated to state law." *Id.* (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Accordingly, we hold that Section 14(d)(7) affords private plaintiffs an implied right of action, and we therefore reverse the dismissal of the Section 14(d)(7) claim.[3]

2. *The Nondisclosure Claims*

Count II of the amended complaint alleged that the various documents relating to the Pay'n Save tender offer and merger, and an earlier Pay'n Save proxy statement, contained various omissions of material facts in violation of Sections 10(b), 14(a) and (e) of the '34 Act, and Rules 10b-5 and 14a-9. As the district court noted, most of these claims essentially allege that Pay'n Save's officers and directors breached their fiduciary duties of loyalty and care under Washington law and failed to disclose these breaches. For example, plaintiff alleged that the defendants had failed to disclose the following "material facts":

> — "Value for the shareholders might have been . . . maximized if the Stroums . . . had been approached, as a potential acquirer."
>
> — "The Standstill Agreement . . . significantly restricted [Pay'n Save's] potential for maximi[z]ing value for its shareholders."
>
> — "The Stroums . . . might have been interest[ed] in acquiring all of the Company . . . but were prevented from doing so because Management and [the] Directors had . . . refused to approach them."
>
> — "Neither Management nor [the] Directors made any effort at all to obtain for the [plaintiff] Class, the

> Premium paid to the Stroums, . . . to obtain an independent and written legal opinion . . . as to [the] validity [of the withdrawal], . . . to adequately inform themselves of the advisability of entering into the Merger Agreement . . ., to adequately inform themselves as to, or to determine what would constitute, a fair premium to the public shareholders . . ., [and] to obtain $25 per share for the public shareholders . . . ."

Amended Complaint ¶¶54-55, 59 (emphasis omitted).

In *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977), the Supreme Court refused to construe Section 10(b) to prohibit "instances of corporate mismanagement . . . in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." The Court held that Section 10(b), as its plain language suggests, prohibits only conduct "involving manipulation or deception," *id.* at 473, manipulation being "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artifically affecting market activity," *id.* at 476, and deception being "misrepresentation, or nondisclosure" intended to deceive. *Id.* Similarly, in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7-8 (1985), the Court rejected the contention that "manipulative" conduct under Section 14(e) differed in scope from conduct deemed manipulative in *Santa Fe* under Section 10(b). The Court observed that "the three species of misconduct" targeted under both sections, namely " 'fraudulent, deceptive, or manipulative' " acts, "are directed at failures to disclose." *Id.* at 8 (citing 15 U.S.C. § 78(n)(e)). The Court accordingly held that "the term 'manipulative' as used in [Section] 14(e) requires misrepresentation or nondisclosure," and "connotes 'conduct designed to deceive or defraud investors by controlling or artifically affecting the price of securities.' " *Id.* at 12 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)).

The Court in *Schreiber* did not, as it had in *Santa Fe* with respect to Section 10(b), express concern that the extension of Section 14(e) to conduct not involving misrepresentation or

nondisclosure might "interfere with" or "federalize" state corporate law. *Santa Fe*, 430 U.S. at 479. Yet, as *Schreiber's* reliance on *Santa Fe* suggests, the policy against overriding state corporate law absent a clear indication of contrary congressional intent applies with equal force to Section 14(e). In anticipating *Schreiber* in *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), we refused to "embark . . . on a course leading to a federal common law of fiduciary obligations." *Id.* at 4; *see also Lewis v. McGraw*, 619 F.2d 192 195 (2d Cir.) (per curiam), *see also Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir.) (per curiam), *cert. denied*, 449 U.S. 951 (1980). Similarly, we have implicitly expressed our disapproval of the use of Section 14(a) and Rule 14a-9 "as an avenue for access to the federal courts in order to redress alleged mismanagement or breach of fidicuary duty." *Maldonado v. Flynn*, 597 F.2d 789, 796 (2d Cir. 1979). We noted further in *Maldonado* that

> [e]fforts to dress up [state-law claims] in a § 14(a) suit of clothes have consistently been rejected, including allegations of failure to disclose a disputed legal theory regarding the legality of transactions approved by the board, failure to disclose an alleged ulterior motive for a fully described corporation action, or failure to disclose lack of skill or judgment in approving a transaction intended for the corporation's benefit.

Id. (citations omitted). Other courts have taken similar positions with respect to Section 10(b) and Rule 10b-5. *See, e.g., Kas v. Financial Gen. Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986) ("plaintiff may not 'bootstrap' a claim of breach of fiduciary duty into a federal securities law claim by alleging that directors failed to disclose that breach of fiduciary duty"; "if the validity of a shareholder's claim of material misstatement or nondisclosure rests solely on a legal determination that the transaction was unfair to a minority shareholder or that an officer or director's conduct amounted to a breach of his fiduciary duty, the claim does not state a cuase of action under sections 10(b) or 14(a)"); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 287-89 (7th Cir.) (same under Section 10(b)), *cert. denied*, 454

U.S. 1092 (1981); *Biesenbach v Guenther*, 588 F.2d 400, 402 (3d Cir. 1978) (same, Section 10(b)).

Language in Judge Friendly's opinion *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978), case not cited by the plaintiff, qualifies the broad proposition that there is no cause of action under Section 10(b) for non-disclosure of facts material only to support an action for breach of a fiduciary duty under state law. While conceding that some of the Court's statements in Part IV of *Santa Fe* squarely supported that proposition, Judge Friendly nevertheless stated:

> Thus the Court, quoting from *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 40, 97 S. Ct. 926, 51 L.Ed.2d 124 (1977), said that one factor in determining whether a case was covered by § 10(b) and Rule 10b-5, was " 'whether the cause of action [is] one traditionally relegated to state law . . . .' " But the Court quickly added, after referring to the Delaware appraisal statute, that "Of course, the existence of a particular state law remedy is not dispositive of the question whether Congress meant to provide a similar federal remedy," and it would be hard to think of a cause of action more "traditionally relegated to state law" than the one asserted in the *Superintendent of Insurance* case, which, as has been said, made "just plain stealing" a fraud under Rule 10b-5, on the basis that Begole failed to tell the directors "in advance that he was going to steal", *Jennings & Marsh, Securities Regulation* 997-98 (1977).

Several sentences later, however, he also stated:

> We readily agree that *if all that was here alleged was that UGO had been injured by "internal corporate mismanagement," no federal claim would have been stated. But a parent's looting of a subsidiary with securities outstanding in the hands of the public in a securities transaction is a different matter*; in such cases disclosure or at least the absence of misleading disclosure is required.

Id. at 220-221 (emphasis added).

We believe the following line to be drawn by our case. Allegations that a defendant failed to disclose facts material only to support an action for breach of state-law fiduciary duties ordinarily do not state a claim under the federal securities laws. Certainly this is true of allegations of garden-variety mismanagement, such as managers failing to "maximiz[e] value for . . . shareholders," Amended Complaint ¶54, of directors failing "to adequately inform themselves," *id.*, or of managers acting in a generally self-entrenching fashion. But where the remedy of an injunction is needed (and is available under state law) to prevent irreparable injury to the company from willful misconduct of a self-serving nature, disclosure of facts necessary to make other statements not misleading is required where the misleading statements will lull shareholders into forgoing the injunctive remedy.

In *Goldberg*, a parent corporation had transferred its assets and liabilities to a controlled subsidiary with public shareholders in exchange for more stock of the subsidiary. Contemporaneous press releases by the parent painted "an inviting picture . . . of the transaction," 567 F.2d at 214. However, the parent's liabilities exceeded the shareholders' net equity by some $10 million, and the transaction transformed the subsidiary from a financially healthy corporation to a firm impaired by a $3.6 million deficit in current liabilities unable to meet its obligations and finding its assets seized by creditors. *Id.* at 212. Although the parent's control of the subsidiary obviated the legal need for shareholder approval and the disclosure attendant to proxy solicitation, the parent's optimistic press release tended to dispel any suspicion of the transaction. Lack of information about the parent's true financial condition in turn caused the public shareholders of the subsidiary to forgo the opportunity to seek an injunction under state law to prevent irreparable injury to the company.

Goldberg also involved out-and-out "looting" and "stealing." Those facts did not require us to distinguish between conduct that is "reasonable" and "unreasonable," or "informed" and "uninformed," distinctions that are the hallmark of state fiduciary law. *Compare Maldonado*, 597 F.2d at 796

(criticizing use of Section 14(a) to redress mismanagement and breaches of fiduciary duty), *with Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650, 655 (2d Cir. 1979) (distinguishing *Maldonado* in light of "allegations of a cover-up of massive bribes and of kickbacks to directors"), *cert. denied*, 445 U.S. 951 (1980). There is no allegation in the present case of willful misconduct of a self-serving nature that called for injunctive relief lest Pay'n Save's shareholders be irreparably harmed. At best, plaintiff alleges that the directors failed to maximize the return to shareholders, and thus his claims are not actionable under Sections 10(b), 14(a) or 14(e).

This conclusion does not dispose completely of the federal claims in Count II, however, because some of the nondisclosure allegations go beyond descriptions of ordinary breaches of fiduciary duties. Specifically, paragraph "fifty-sixth" of the amended complaint alleges that

> The [Offer to Purchase and related documents] and the 1984 Proxy Statement were materially false and misleading in:
>
> • • •
>
> (2) Stating that the Stroums' Shares issued in the Schucks acquisition, were "valued at approximately $70 million" without disclosing the material fact that the Acquisition Price was equivalent to $25 per share.
>
> (3) Failing to disclose the interrelationship of Bean's [management's] Directors as alleged in Paragraph SEVENTH hereof, and in burying their identity in Annex G at the end of the Offer to Purchase.

Amended Complaint ¶56 (emphasis omitted). In determining whether these claims were properly dismissed under Rule 12(b)(6), we may of course refer to the Offer to Purchase and the 1984 Proxy Statement, which were annexed to defendants' motion to dismiss and are documents that are integral to plaintiff's claims. *See Furman v. Cirrito*, 828 F.2d 898, 900 (2d Cir. 1987); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 593 (1969); *id.* § 1364, at 668-73.

With regard to the allegations in subparagraph (2), the Offer to Purchase states in clear language that in January 1984, Pay'n Save bought Schuck's Auto Supply by issuing the Stroums 2,799,014 shares of Pay'n Save stock, and that under the terms of the exchange these shares were worth $70 million. The omission of the $25-per-share figure is not material in light of the fact that dividing the number of shares into $70 million would disclose a price of $25.01 per share. The defendants' failure to perform this calculation for investors cannot be said to have "significantly altered the 'total mix' of information" available to reasonable investors, *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), and thus does not constitute actionable nondisclosure. *See Datatab*, 722 F.2d at 5 (no further disclosure required where "conclusion obvious to anyone conversant with elementary mathematics").

Moreover, the only possible relevance of the per-share value of the stock issued to the Stroums would be to illumine for investors the possible motives of the Stroums in demanding a $25 per share price. Even assuming that a motive other than profit maximizing was relevant, the circumstances were amply disclosed. For example, immediately after describing the terms of the acquisition of Schuck's Auto Supply from the Stroums for shares expected to be worth $70 million, the Offer to Purchase states that "[a]fter issuance on January 27, 1984, however, such Shares [the shares issued to the Stroums] had a quoted value in the over-the-counter market of $56,680,034." Offer to Purchase at 3. That the Stroums might have been upset at the performance of their new investment is obvious. Indeed, the Offer to Purchase understandably points out that "differences over the management of the Company . . . developed after the closing of the transaction." *Id.* An explicit statement that the Stroums, pursuant to the fully-disclosed Settlement Agreement with the Trumps, effectively received the $25 per share they originally expected to receive in the Schuck's transaction, simply would not add anything material to the facts otherwise disclosed.

We turn now to subparagraph (3), which alleges first that the defendants failed to disclose the information described in

paragraph "seventh" of the amended complaint, namely various social and professional relationships among the officers and directors of Pay'n Save. These include, for example, the alleged facts that Raymond C. Swanson, a director and Secretary of Pay'n Save, was a member of a law firm that represented Pay'n Save; that some of the directors were also co-directors of another company; and that three of the directors had known M. Lamont Bean, the Chairman and Chief Executive Officer of Pay'n Save, socially for many years. *See* Amended Complaint ¶7. Such trivia, however, is immaterial as a matter of law, especially in light of the extensive disclosure of management and director stock ownership and the terms of management's participation in the leveraged buy-out. Finally, the other allegation in subparagraph (3) — that the defendants violated their disclosure obligations by "burying" the identity of the directors in Annex G to the Offer to Purchase — is frivolous as a matter of law. *See Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 267 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972).

3. *The RICO Claim*

The district court dismissed plaintiff's RICO claim on the ground that the alleged racketeering acts "were simply a series of events necessary to achieve a single objective, namely to take the company private," *Field v. Trump*, 661 F. Supp. at 535, and therefore did not establish a pattern under RICO. The plaintiff correctly argues that this legal conclusion is inconsistent with our decision in *United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). However, the defendants correctly respond that the result reached by the district court — dismissal — is entirely consistent with our decisions in cases such as *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988), which hold essentially that a scheme "carried out 'in pursuit of a single short-lived goal' " does not establish a RICO enterprise. *Beauford v. Helmsley*, 843 F.2d 103, 109 (2d Cir. 1988) (quoting *Creative Bath Prods., Inc. v. Connecticut Gen. Life Ins. Co.*, 837 F.2d 561, 564 (2d Cir. 1988)), *reh'g in banc granted* (Apr. 13, 1988). Nevertheless, because we have recently decided to rehear *Beauford* in banc "to clarify Second Circuit law," 843

F.2d at 109, we will affirm on a different ground. Because we have found that plaintiff has not stated a valid claim that the Offer to Purchase or 1984 Proxy Statement were materially misleading, it follows that the complaint does not allege securities fraud or mail fraud for the purposes of establishing a pattern of racketerring activity under RICO. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 19 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

CONCLUSION

For the above reasons, the dismissal of Counts II and III of the complaint are affirmed. The dismisal of Count I is reversed. Because the reversal on Count I may restore pendent jurisdiction over the state-law claims in Counts II and IV, the dismissal of those claims is also reversed.

Affirmed in part and reversed in part.

FOOTNOTES

[1] Whether the "fees and expenses" for which the Trumps paid $900,000 to the Stroums were actually incurred is irrelevant under the "best-price rule." Some or all of those sums were expended in order to obtain a premium for the Stroums, and it would thwart the purposes of Section 14(d)(7) to allow reimbursement. Moreover, we believe the "best-price rule" would be unworkable if offerors were permitted to discriminate among shareholders according to expenses that were not uniformly incurred, such as broker's or attorney's fees.

[2] Defendants have emphasized that "the public shareholders of Pay'n Save ultimately received $23.50 per share, or approximately $5.00 per share in excess of the market value of their shares on the last full trading date prior to the announcement of the proposed tender offer and merger." Appellees' Joint Brief at 2-3. They apparently wish to stress that application of the "best-price rule" where a payment of a premium above the offer to a large shareholder is necessary to consummate the transaction will ultimately work to the deteriment of shareholders generally by decreasing such transactions. This point, however, can be made about the Williams Act generally, *see, e.g., Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 262 (7th Cir. 1986) (citing Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J. Law & Econ. 371 (1980)), *rev'd on other grounds*, 107 S. Ct. 1637 (1987), and thus must be addressed to Congress.

[3] Because full relief is available to plaintiff under Section 14(d)(7), we need not address the claim asserted under Rule 10b-13. *Cf. Pryor*, 794 F.2d at 53; *see also Beaumont v. American Can Co.*, 797 F.2d 79, 83-84 (2d Cir. 1986) (expressing doubt that private right of action exists under Rule 10b-13)

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No 88-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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Petitioners,

v.

BERTRAM FIELD, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PETITIONERS' REPLY MEMORANDUM

PRELIMINARY STATEMENT

Respondent contends that this Court should let stand a situation where a tender offeror's literal compliance with the safe harbor provisions of SEC Rule 14d-2(b) would legally and retroactively terminate a planned tender offer everywhere in the United States except within the Second Circuit, which court would require, in addition, that the offeror "genuinely intends to abandon the goal" of acquiring the target company. Having for the first time to defend the decision of the Court of Appeals — a decision as unprecedented as it was unexpected based upon the arguments presented to that court — Respondent is forced to rely upon a decision never even cited at any prior time in this proceeding by either court or counsel and an allegation never made in the complaint, *i.e.*, that the public announcements at issue "do not comply with Rule 14d-2(b)." Res. Br. at 9.

As set forth in the Petition, SEC Rule 14d-2(b) treats a public announcement of an intent to begin a tender offer in the future, followed within five business days by a public announcement of a determination not to begin such an offer, as a nullity; *i.e.*, if both announcements are made and contain the proscribed information, the legal effect is that no tender offer was commenced as a result of the initial announcement. Indeed, but for Rule 14d-2(b), the announcement of a present intent to commence a future tender offer would not, alone, constitute the making of a tender offer. Despite the fact that there is no allegation in the complaint that Petitioners' public announcements did not contain the information required by the Rule or were untimely, the Court of Appeals nevertheless applied Rule 14d-2(b) to find a tender offer had begun, but judicially disregarded the safe harbor provisions of the Rule in order to find a violation.

The Second Circuit held that Section 14(d)(7) — the "best-price rule" — would apply from the first public announcement, regardless of whether Petitioners complied with the letter of Rule 14d-2(b). It concluded that in order for Petitioners or any other bidder to obtain the safe harbor provided by the Rule — that no tender offer had been commenced — Petitioners must not only make the second public announcement required by the Rule but, at the same time, must also demonstrate they "genuinely intend[ ] to abandon the goal of the original offer, (A-11)," *i.e.*, acquisition of the target company.

As set forth in the Petition, this holding: (1) conflicts in principle with authority in other circuits and is contrary to this Court's reasoning in *Schrieber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985); (2) conflicts with the policy and purpose of Rule 14d-2(b); (3) conflicts with the SEC's own construction of the Rule; (4) conflicts with the SEC's own view that private purchases subsequent to withdrawals of tender offers are not unlawful; (5) conflicts with prior Second Circuit authority to the same effect; and (6) introduces uncertainty into the securities laws, a result repeatedly avoided by this Court and other federal courts.

Respondent never addresses these issues except in conclusory terms. Instead, Respondent tries to justify the Second Circuit's holding based on a single sentence of *dicta* in a single case, *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). The fact that another case in the same circuit purportedly supports the instant erroneous decision is utterly irrelevant to the issue of whether *certiorari* should be granted. Respondent also argues that because this appeal is interlocutory the Court should decline to grant *certiorari* — despite the fact that it was an appeal from a final order and despite the fact that this Court has exercised discretion and granted *certiorari* in many recent cases which came to the Court in the same procedural posture as this case. Indeed, Respondent's lack of support for the Second Circuit's holding demonstrates how erroneous it was and the potential for unpredictable results and departures from settled law which application of that decision will bring. *Certiorari* should be granted.

ARGUMENT

Respondent's Brief in Opposition confirms that the central issue involved in this petition is the question whether the announcement of an intent to commence a tender offer at $22.50 ("the September 7 Announcement"), followed by an announcement, within 5 business days, of a determination not to commence such an offer (the "September 12 Announcement") nevertheless may result in a tender offer. There is no allegation in the complaint or elsewhere that these announcements constituted an "unorthodox" or "unconventional" tender offer under the *Wellman* test.[1] Nor is there any allegation that these announcements constituted commencement of a formal tender offer pursuant to Rule 14d-2(a). Thus, it is only Rule 14d-2(b) which can transform these public announcements into the commencement of a tender offer, and under that Rule no tender offer was commenced. As explained in the Petition, however, the Second Circuit ignored the words and policy of Rule 14d-2(b) and held incorrectly that a tender offer did result.

Rule 14d-2(b) determines the legal effect of the September 7 Announcement. The Rule provides the announcement "shall be deemed to constitute the commencement of a tender offer." Thus, the Rule itself creates a "tender offer" even though no formal offer has begun. The Rule however provides a safe harbor exception: "Except, that such tender offer shall not be deemed to be [commenced] if within five business days of such public announcement, *the bidder . . . [m]akes a subsequent announcement stating that the bidder has determined not to continue with such tender*

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[1] This refers to the eight factor test announced in *Wellman v. Dickinson*, 475 F. Supp. 783, 817-18 (S.D.N.Y. 1979), *aff'd* 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). *See also* Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1276-77 (1973).

offer."[2] Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (emphasis added). In essence, the subsequent public announcement cancels the legal fiction that a tender offer has been commenced. Here, on September 12, 1985, within five business days, the Trumps — the bidder — announced that no tender offer at $22.50 would be made. Despite Respondent's claim to the contrary, Res. Br. at 9, there is no allegation in the complaint that the September 12 Announcement did not comply with Rule 14d-2(b).

Literal compliance with the Rule should have ended judicial scrutiny. The SEC intended to "provide[ ] certainty to bidders" as to when a tender offer began and ended, thereby "preventing the imposition of *undue burdens* on a bidder. . . ." Exchange Act Release No. 16,384 [1979-80 Transfer Binder] Fed Sec. L. Rep. (CCH) ¶ 82,373 at 82,583 (Nov. 29, 1979) (emphasis added). The SEC recently affirmed that Rule 14d-2(b) only requires literal compliance and that a court must accept at face value an announcement that commences a tender offer according to the terms of Rule 14d-2(b). As the SEC explained, in an *amicus curiae* brief in *American Carriers, Inc. v. Baytree Investers, Inc.*, No. 88-1533 (10th Cir.) [Appeal dismissed per stipulation, Dec. 2, 1988], any test other than literal compliance would not "make sense. If the rule were only triggered when it has first been determined by independent judicial tests that an offer has commenced, there would be no need for a rule. . . ." SEC

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[2] Rule 14d-2(b) does not deal with intent. Thus, Respondent's claim that Rule 14d-2(b) provides a "tender offer shall not be deemed to have commenced where the bidder '*has determined* not to continue with such tender offer'" misleadingly quotes only part of the Rule. Res. Br. at 9. (emphasis added). The Rule only requires that a bidder makes a *public announcement* to that that effect. Of course, if the announcement is false, the anti-fraud provisions of the Act, e.g., § 10(b), would apply. Here, the Court of Appeals has found that Petitioners fully disclosed all material information (A13-18).

Brief at 13. Clearly here also, the SEC's purpose of certainty is disserved if the effectiveness of a withdrawal depends upon later judicial scrutiny.[3]

Despite Petitioners' compliance with the plain text of Rule 14d-2(b), the Second Circuit nevertheless created a wholly unnecessary[4] and legally incorrect judicial gloss[5] on the Rule by holding the announcement of an intent not to continue an offer is not "effective" unless the tender offeror "genuinely intends to abandon the goal of the original offer," (A-11) *i.e.*, acquisition of the target company.[6]

Petitioners' literal compliance with Rule 14d-2(b) also satisfied the policies behind the Rule. The SEC designed the Rule to prevent bidders from publicly announcing the material terms of a cash tender offer while postponing making full disclosure, thus leaving shareholders to make investment decisions on the basis of incomplete information. Exchange Act

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[3] An agency's interpretation of its own rules is, of course, entitled to substantial deference. *Train, Inc. v. N.R.D.C.*, 421 U.S. 60, 75, 87 (1975).

[4] There was no need to extend the protection of Section 14(d)(7) because the problems mentioned by the Second Circuit would have been covered by other provisions of the securities laws. *See* Petition for a Writ of Certiorari, 15-16.

[5] The gloss adopted by the Second Circuit was totally spontaneous. Respondent never alleged that Petitioners failed to comply with the requirements of Rule 14d-2(b). Moreover, Respondent did not even make the argument that 14(d)(7) was dispositive. Instead Respondent argued to the Court of Appeals that because Section 14(d)(7) could be evaded — an admission the section was not applicable — Rule 10b-13 was the "single most important issue on this appeal." Res. Brief in the Second Circuit at 34, 1. The Second Circuit rejected the Rule 10b-13 claim in a footnote.

[6] Respondent's argument that the test of an effective withdrawal pronounced by the Court of Appeals is objective rather than subjective is ludicrous. The Second Circuit's own language, that a withdrawal is effective when the offeror "genuinely intends to abandon the goal of the original offer," 850 F.2d at 945, clearly forecloses that argument. As a general principle, words like "honestly intend" or "genuinely intend" denote a subjective inquiry. *Cf. Laffey v. Northwest Airlines, Inc.*, 740 F. 2d 1071, 1098 n.43 (D.D.C. 1984), *cert. denied*, 469 U.S. 1181 (1985) (test whether employers "honestly intend" to act in accordance with Equal Pay Act was subjective).

Release No. 15,548, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935 at 81,228 (Feb. 5, 1979). Rule 14d-2(b), promulgated pursuant to Section 14(e) of the Williams Act, is consistent with the policy of full disclosure reaffirmed by this Court in *Schreiber v. Burlington Northern Inc.*, 472 U.S. 1, 12 (1985); *see also* Petition, at 16-19. That purpose was satisfied here. The Court of Appeals found Petitioners fully disclosed all material information. A13-18. Respondent concedes there was full disclosure, that "Petitioners clearly stated what they would do . . . [a]nd they did it," and "[t]he circumstances [of the withdrawal] required little interpretation, because they were not hidden." Res. Br. at 5, 16. Although Respondent avoids any mention of *Schrieber*, its vitality is unquestioned.[7]

It is also undisputed that this withdrawal was followed by the formal commencement of a tender offer at $23.50 — a $1 premium over the inchoate $22.50 plan. Again this was in complete accord with the SEC's purpose in adopting Rule 14d-2(b). Indeed, the SEC designed Rule 14d-2(b) to permit cancellation of the announced offer in order to "allow a bidder to consult with the subject company and to make an evaluation of the probability of success of a 'friendly' acquisition which might further benefit investors." Exchange Act Release No. 15,548, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935 at 81,228 (Feb. 5, 1979). Here the withdrawal pursuant to Rule 14d-2(b) allowed the bidder to do just that and worked to bring an extra dollar per share of further benefit to shareholders.

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[7] Since the filing of the Petition for Certiorari, the *Schrieber* principles were followed by the Third Circuit. In *Polaroid Corp. v. Disney*, No. 88-3676 (3d Cir. Nov. 23, 1988), the court was faced with a challenge to Rule 14d-10, the "All-Holders Rule," adopted — as Rule 14d-2 was — under Section 14(e) of the Williams Act. The *Polaroid* court anchored its analysis of Section 14(e) to this Court's decision in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), and observed that: "*Schreiber characterizes even . . . section 14(d)(7) . . . as "requir[ing] or prohibit[ing] certain acts so that investors will possess additional time within which to take advantage of the disclosed information.*" Slip op. at 13 (emphasis added).

Both Respondent and the Second Circuit ignore the current law that purchases after withdrawal of an offer are *not* integrated with the offer. The SEC proposed — but did not adopt — two rules, Rule 14d-8 and Rule 14d-11, both of which would have integrated purchases after withdrawal of a tender offer. *See* Petition for a Writ of Certiorari at 14. Either proposed rule would have treated the problem of withdrawals followed by purchases — the events at issue here — as a single offer. If purchases after withdrawals were currently unlawful, according to the Second Circuit, in another context, the SEC "would scarcely have proposed [these rules]." *Fogel v. Chestnutt*, 533 F.2d 731, 752 n.25 (2d Cir. 1978), *cert. denied*, 429 U.S. 824 (1976). Here according to Rule 14d-2(b), there was no prior tender offer. And yet the Second Circuit has made unlawful actions which the SEC does not consider unlawful. Respondent has failed to address this fundamental inconsistency in the Second Circuit's holdings.

Instead of discussing these issues, Respondent urges this Court to deny *certiorari* because of this Court's "custom" of denying *certiorari* in connection with "interlocutory orders," Res. Br. at 11, and because a single prior decision in the same circuit purportedly supports the instant erroneous decision, Res. Br. at 4-5. Neither claim is a valid ground to deny *certiorari*.

First, the Second Circuit decision here was an appeal from a *final* judgment — a dismissal under Fed. R. Civ. P. 12(b)(6) — not from an interlocutory order. It is also equally clear that this Court may grant *certiorari* to review interlocutory decisions[8] and procedural rulings.[9] Recent history dem-

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[8] 28 U.S.C. § 1292(b) provides for interlocutory appeals from the district courts to the courts of appeals, in their joint discretion. Judgments in cases accepted by the court of appeals under § 1292(b) are, in turn, reviewable by the Supreme Court under § 1254. *Fortnightly Corp. v. United Artists Television, Inc.*, 389 U.S. 969 (1967).

[9] *International Union, United Automobile Workers v. Scarfield*, 382 U.S. 205 (1965), (order denying intervention on review of NLRB order); *American Power and Light Co. v. SEC*, 325 U.S. 385 (1945) (order denying motions to dismiss review of SEC order).

onstrates this Court's practice of granting *certiorari* to a circuit court reversing, in full or in part, a dismissal — as presented here — pursuant to Rule 12(b)(6). *See, e.g., Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Alexander v. Choate*, 469 U.S. 287 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

Second, Respondent's reliance on *Missouri Portland Cement Co. v. Cargill, Inc.*, 495 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) — a case previously cited nowhere by either the parties or the courts below — is entirely misplaced. The fact that another case in the same circuit purportedly supports the instant erroneous decision is utterly irrelevant to the appropriateness of a grant of certiorari. In any event, *Cargill* is irrelevant. *Cargill* merely indicates, in *dicta* and in the context of non-disclosure claims, that Section 14(d)(7) might apply to two offers where the first offer's expiration is followed by commencement of a new offer. *Cargill, supra*, 498 F.2d at 874.[10] Here, Rule 14d-2(b), adopted subsequent to *Cargill*, makes clear there was no tender offer at $22.50 as a result of the two public announcements. Moreover, here there is no valid claim of nondisclosure. Finally, the SEC, in proposing Rule 14d-8, has indicated its belief that Section 14(d)(7) would not reach the situation in *Cargill*, that is, where a "bidder may within a short time after the first tender offer [has expired] make a second tender offer for securities of the same class for different consideration which may be higher than that offered in the first tender offer." Exchange Act Release 15,548, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935 at 81,230. Thus, *Cargill* has no bearing on the question of whether a grant of *certiorari* is appropriate.

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[10] In fact, the authority cited by the *Cargill* court, Aranow & Einhorn, Tender Offers for Corporate Control (1973), p. 135-37, makes clear that two different tender offers are required as a basis for integration.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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